VOLUME III

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 28

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN SECRETARY OF THE INTERIOR, PETITIONER

vs.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, ET AL.

~~No. 29~~

THE VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

vs.

THE FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC POWER COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1952
CERTIORARI GRANTED MAY 5, 1952

EXAMINER'S DECISION OF MARCH 17, 1950

[5420] HAMPTON, *Chief Presiding Examiner*: This proceeding arises upon an application for license under Section 4 (e) of the Federal Power Act, filed on October 6, 1948, by Virginia Electric and Power Company (sometimes hereinafter referred to as "Applicant" and sometimes by its popular designation: "VEPCO"). An amendment to the application was filed on April 6, 1949.[1]

Applicant is a public utility corporation which produces, transmits, distributes and sells electric energy for all the usual, lawful purposes in the greater part of the State of Virginia, and, as well, in the northwestern portion of North Carolina and the east central portion of West Virginia. VEPCO's generation facilities include both steam-electric and hydroelectric plants. One of its existing hydroelectric developments is located on the Roanoke River very near the site involved in the instant application.[2]

The project proposed in the pending application (designated on the Commission's records as Project No. 2009) was well described in the application and its amendment. This description follows:

> The proposed dam would be built across the Roanoke River, above the Town of Roanoke Rapids, North Carolina, near the head of the present rapids, and approximately at the location of an existing diversion dam. The dam would create a reservoir extending upstream about 7½ miles.

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[1] In general, the amendment covered plans for an increase in the aggregate of the proposed project's installed capacity from 98,000 to 125,000 horsepower, and included plans for deepening the tailrace to a point about 8,000 feet downstream from the powerhouse. In this decision, the term "proposed project" will refer to the plans included in the application as amended.

[2] This is an unlicensed project to which special reference will hereinafter be made.

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[5421] The proposed dam would be mainly of mass concrete approximately 2,840 feet long, of which about 250 feet would be occupied by a powerhouse, about 1,080 feet by a gate-controlled spillway, about 750 feet by an emergency overflow spillway, and the remainder by bulkhead sections at each end of the dam. The spillway crest would have an average height of about 40 feet above the bed rock of the river, with steel gates designed to hold the normal pond level at Elevation 132 and to have a discharge capacity of about 350,000 c. f. s. with pond level at Elevation 132. The emergency spillway section would be built to Elevation 134 and the bulkhead sections, spillway deck and intake deck would be constructed to Elevation 142.

The reservoir formed by the dam would have an area of about 4,900 acres at normal pond level.

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Generators will include three rated at approximately 27,000 kw. each and one at about 10,000 kw., or a total of approximately 91,000 kw. * * * Total installed capacity would be about 125,000 horsepower * * *.

Notice of the receipt of the application was given to the public in accordance with the statute, and to the agencies of the Federal Government and of the States involved. The Commission has *prima facie* authority under Part I of the Federal Power Act to entertain the application since it involves hydroelectric development of a navigable water of the United States by a non-Federal interest.

Two agencies of the Federal Government—the Department of the Army and the Department of the Interior—rendered reports which had been requested of them as required by Section 4 (e) of the Federal Power Act. The Army's report concerned itself primarily with navigation. Interior's report concerned itself with measures required for the protection of fish and wildlife resources since there are [5422] no public lands of the United States affected by the project as proposed. The Secretary of the Interior [3] announced on January 6, 1949, that

[3] Hereinafter sometimes variously referred to as "the Secretary" and "Interior."

he would oppose the application. On March 22, 1949, the Commission issued an order setting the matter down for public hearing. This order framed the issues as they then appeared. Nothing presented by any party has served to change the issues substantially.

Following the issuance of the hearing order, four petitions to intervene were filed. Two electric-utility corporations with service territories contiguous to that of the Applicant,[4] and a group of eleven electric cooperatives in Applicant's service territory, organized under the Rural Electrification Administration,[5] were permitted to intervene. The Secretary of the Interior also asked formally to be admitted as an intervener, and while his petition resulted in his being given at once the full rights of participation in the proceeding, the formal status of "intervener," as such, was then denied him. A request for reconsideration of this denial was rejected by an order of the Commission issued June 22, 1949. However, a second request for reconsideration resulted in an order issued September 2, 1949, granting [5423] the application for reconsideration of the denial of the petition to intervene, and including among the matters to be decided in the final disposition of this proceeding the question of whether or not the status of intervener should be granted to the Secretary.

The public hearing ordered by the Commission was concluded on June 16, 1949. All parties, including the Commission's Staff, and the Secretary of the Interior, were given full opportunity to present evidence and to participate properly in examination and cross-examination of witnesses as well as to present their views and such objections and motions as they desired to lodge. All parties including the Staff and the Secretary of the Interior have filed comprehensive briefs.

The Status of the Secretary of the Interior

Before proceeding to the issues arising from the application it appears desirable that the status of the Secretary of the Interior be determined. The Secretary points out that, by law,

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[4] Appalachian Electric Power Company ("Appalachian") and Carolina Power & Light Company ("Carolina").

[5] Virginia REA Association et al. will be referred to hereinafter as "REA Association" or "REA."

he is the sole marketing agent for surplus electric energy generated by projects constructed by the Corps of Engineers and it is contended that since the Roanoke Rapids project has been set aside by Congress for Federal development only (according to his view of the law), he is directly concerned with any action which might be taken on the pending application. Other and less persuasive bases for intervention have also been urged. If the project has been reserved by Congress for federal construction, as contended, the application should be dismissed forthwith for want of jurisdiction. It would appear that the Commission [5424] has considered participation in the proceeding by the Secretary as desirable and in the public interest in order that a complete record may be made on this question of jurisdiction. However, it appears that in the Secretary's opinion, the status of formal intervener has important significance with respect to judicial review under Section 313, wherein, under strictly a literal interpretation, the view has been expressed that only "parties" to a proceeding before the Commission may set in motion the machinery which could bring before a Court a grievance arising from the Commission's final determination and disposition of the case.

It should be noted that the Commission's General Rules make provision specifically for the filing of a petition to intervene by an agency of the Federal Government by defining such agencies, instrumentalities, or their duly authorized officers as "persons" and then stating that a petition to intervene may be filed by "any person claiming a right to intervene." The rules then suggest various kinds of rights or interests which may be urged in support of such petition, ending finally with "any other interest of such nature that petitioner's participation may be in the public interest."

It would appear that the Commission, by giving the Secretary the right of participation in the proceeding before it, must have felt that such participation may be in the public interest and appropriate to the administration of the statute under which this proceeding is brought, even though he might not be a necessary or indispensable party. It is considered also, upon the record that the Secretary [5425] does have an interest sufficiently substantial adequately to support his request for

the status of intervener, and it is not desired to split technical hairs either on this point or with reference to the meaning or the correct definition of the word "person." The word "person", has no rigidly fixed meaning, as viewed by the weight of judicial decisions, but when used in a statute has varying meanings depending upon contemporary conditions, the connection in which it is used and the result intended to be accomplished.

Certainly under the statute and the Commission's rules and in the circumstances of this proceeding as well as upon the evidence of his interest, there is no wish or inclination here to deny to the Secretary—a Cabinet Member—recognition as a "person" or to attempt to deny him the opportunity to have this decision reviewed by the Courts if affirmed by the Commission.

It is held both that the Secretary is a "person" within a reasonable interpretation of the Act and that he is qualified by his interest and identity formally to intervene in this proceeding. Further, the Secretary's intervention may well be in the public interest.

Whether the Secretary may be "aggrieved" by any order issued herein and whether he may succeed in obtaining court review of such order on a petition for review, are matters which will be determined by the Court to which his petition may be addressed.

Formal intervention by the Secretary of the Interior will be allowed.

[5426] **Jurisdictional background**

The basic issues in this proceeding may be understood the more clearly if a summary is given first of the undisputed facts in the background of the jurisdictional question. The Roanoke River is an interstate stream. Rising on the eastern slope of the Appalachian Mountains and flowing in a southeasterly direction toward the Atlantic coast, it empties into Albemarle Sound. Parts of Virginia and North Carolina are included in the watershed of this river. Its basin, which includes the basin of the Smith River, is approximately 220 miles long, and from 10 to 100 miles in width. The Smith River

is a tributary of the Dan River, which in turn is the principal tributary of the Roanoke. A complete description of the watershed, together with data respecting its geography, drainage, topography, geology, economic development and hydrology is contained in House Document No. 650, 78th Congress, 2nd Session. This legislative document and the legislation which preceded and followed it are indispensable source materials in the understanding (and, to a lesser degree, the disposition) of the jurisdictional issue presented by this application for license.

Congressional interest over the years in the Roanoke River has come about for two principal reasons: (1) the usefulness of the lower section for navigation and (2) the occasional floods which, by reason of their severity, have made preventive measures imperative. Projects for improvement of the Roanoke River for navigation (dredging, snagging, and the regulation of the stream) have brought the upper limit of improvement to Weldon, N. C., 130 miles from its mouth. [5427] Weldon is approximately 7½ miles below the nearest point of the proposed project.

Before Congress undertook flood control in the Roanoke Basin, there were no large-scale flood control works by the States involved. There are yet no large-scale flood control works in the basin, but the groundwork for an ambitious program may be discerned from the several important legislative steps which have been taken.

While navigation reports on the Roanoke River date back as far as December 1871, the first report presented to Congress by the Army Engineers embracing the basin as a whole was published as House Document No. 65, 74th Congress, 1st Session and was authorized under the provisions of House Document No. 308, 69th Congress, 1st Session. That first report, covering navigation, flood control, power development, and irrigation, concluded that while affording a potential source of hydroelectric power, a comprehensive plan for the improvement of the Roanoke River and its tributaries for navigation, and the prosecution of such improvement in connection with the development of potential power, flood control, or irrigation, was not economically justifiable at that time (1934). House Docu-

ment No. 65, popularly referred to as the "308 Report," not only contained a study of all of the sites in the main stream and its tributaries which, in the opinion of the Chief of Engineers could be developed physically for flood control purposes, but also various sites which, if the economic picture justified such development, could be utilized for the sole purpose of generation of electric energy.

[5428] In 1940 and 1942, the Committees on Flood Control and on Rivers and Harbors of the House of Representatives, transmitted to the Chief of Engineers nearly identical resolutions requesting that officer to undertake a review of the aforementioned 308 Report, with a view to determining whether any improvements in the interests of flood control and allied purposes "are advisable at this time." The requests of these Congressional committees were authorized by the Flood Control Acts approved on June 22, 1936, and June 28, 1938.

Thus we come to the report requested, published in 1944 as House Document No. 650. In this report there are the concurrences of the Board of Engineers for Rivers and Harbors, the Federal Power Commission and the Chief of Engineers in the District Engineer's report and a finding by the Board that "a comprehensive plan of improvement, consisting of 11 developments for hydroelectric power, flood control, navigation, and other uses, is economically justified and provides the best plan for the development of the water resources of the Roanoke River Basin." The 11 developments listed in the order of their priority were Buggs Island, Gaston, Roanoke Rapids, Smith Mountain, Leesville, Taber, Melrose, Randolph (on the main stream or minor tributaries) and Philpott, Stuart, and Schoolfield (on the large tributary streams). Adoption of the general plan for development and authorization of construction of the Buggs Island and Philpott projects "generally in accordance with the plans of the district engineer, and with modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable" were recommended, and a cost [5429] figure for the over-all development was submitted. The Chief of Engineers said: "To safeguard the interests of navigation and flood control, the dams and power facilities should be constructed, operated and maintained, under the

direction of the Secretary of War and the supervision of the Chief of Engineers."

Following receipt of this report and these recommendations, Congress enacted the Flood Control Act of 1944 (58 Stat. 887) which, following a lengthy statement of purpose (from which we cannot derive much aid in the determination of the jurisdictional question), included under the heading "Roanoke River Basin" the following:

ROANOKE RIVER BASIN

> The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, is approved and the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000.

Based upon one of the authorizations contained in the Flood Control Act of 1944, the Corps of Engineers prepared a report entitled "Definite Project Report on Buggs Island Reservoir," and construction of that authorized project was undertaken and is now under way.

The Buggs Island project is a multiple-purpose development, and when completed will provide, among other benefits, needed flood control, as well as regulation of the river for navigation and [5420] sanitation. The Definite Project Report shows that in addition to performing these primary functions the Buggs Island project will have a generator capacity of 108,000 kilowatts initially and 204,000 kilowatts ultimately for the production of electric energy, the greater share of which will be available for local purchase by electric cooperatives and public bodies and utility companies in the area. There seems to be no question that because of its flow pattern which can be predicted with reasonable accuracy from past records, the Roanoke River will produce most economically

what is known as low-load-factor power. Thus Buggs Island and Roanoke Rapids energy will be most usable on utility systems which have steam or other capacity to furnish firm energy for base load. The Secretary of the Interior is vested by law with the authority and responsibility of disposing of any surplus power produced at any plant in the Roanoke River Basin built by the Army Engineers. This authority, contained in Section 5 of the Flood Control Act of 1944, authorizes and directs the Secretary to dispose of such energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers and consistent with sound business principles. Under this law, public bodies and cooperatives are preferred customers for this energy byproduct of Federal dams.

Any proper development of the Roanoke Rapids site, approximately 41 river miles downstream from the Buggs Island Reservoir, unquestionably would benefit from the regulation provided by the Buggs [5431] Island project. The project at the Roanoke Rapids site as conceived by either the Army or the Applicant would be valueless for flood control and would have a negligible effect upon navigation.

It is interesting, but not particularly significant, that the Applicant, VEPCO, owns practically all of the lands necessary for development at Roanoke Rapids. Applicant and other power companies have been interested in various sites along the river for some time; several preliminary permits have been issued by the Commission to private power companies from time to time since 1920 and have expired or were withdrawn prior to expiration. The District Engineer's speculation that the construction of hydroelectric power projects at the better sites in the basin was delayed by private interests because of the depression of 1929–1936 is a reasonable explanation for the lack of utilization of these valuable water resources. But now VEPCO desires a license and is ready, willing, and apparently able to proceed at once with the construction of a power development at Roanoke Rapids. It is certain that this Applicant has established its need for additional sources of electric energy to meet its growing load and must make provision for new sources in the years to come. The Applicant

has concluded that the development of Roanoke Rapids represents the better investment in a cost comparison of the proposed hydro plant and an equivalent steam-electric generating plant, from a long-term standpoint.

[5432] THE ISSUES IN THIS PROCEEDING

The issues are set forth in the Commission's hearing order in this proceeding. Simply restated, they are: (1) Does the Commission have jurisdiction to issue a license to a non-Federal or private interest for hydroelectric development of the Roanoke Rapids site? (2) Is the Roanoke Rapids development one which, in the judgment of the Commission, should be undertaken by the United States itself? (3) Are the VEPCO plans for development of the water resources at Roanoke Rapids as stated in the amended application, best adapted to the comprehensive plan approved by the Congress for improving or developing the Roanoke River for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes?

As developed by the parties at the hearing and in their briefs, the jurisdictional question may be boiled down to this question: "Did Congress, by Section 10 of the Flood Control Act of 1944, reserve the development of Roanoke Rapids for the United States itself, and thus remove the project site from the licensing authority of the Commission under Section 4 (e) of the Federal Power Act?". This question has been recognized by all concerned as being the nub of the jurisdictional controversy.

Those opposing the application contend that the Federal Power Commission's letter of May 3, 1944, contained in House Document [5433] No. 650, is or has the effect of a finding and recommendation under Section 7 (b) of the Federal Power Act to the effect that the proposed project should be developed and constructed by the United States itself, and that this action by the Commission performed its function under Section 7 (b) and now deprives it of jurisdiction to approve the pending application and issue a license.

There are two interlocutory matters which must be settled. One of these is a motion by the intervener, REA Association,

supported by the Secretary of the Interior, to strike Exhibit 11, such exhibit being an Army District Engineer's report which formed the basis of the statutory report by the Department of the Army on this application requested by the Commission under the provisions of Section 4 (e). The other matter requiring disposition is the request by counsel for the REA Association of Virginia to include in this record the factual data from a certain press release of the Rural Electrification Administration relating to the grant of a loan for a steam-electric generating plant to a generation cooperative composed of the same cooperatives who are members of the REA Association, an intervener in this proceeding.

CONTENTIONS

The parties have aligned themselves in two groups, one group supporting and one opposing the pending application. The proponents, besides the Applicant, are two other utility companies (Carolina and Appalachian) and the Commission's staff. Opposing the granting of the application are the Secretary of the Interior and the REA Association [5434] of Virginia. Each party separately has stated its contentions and separately has filed proposed findings of fact and conclusions of law implementing its contentions. In general, there is unanimity within each of the two groups but because each party separately has filed principal and reply briefs, there are minor variations in the separate approaches and in the findings proposed and requested.

The findings proposed have been given earnest and careful consideration and the record has been examined at it relates to each. Except as indicated in this decision by our findings, statements and discussion, wherein many of them have been adopted substantially, wholly, or in part, they are rejected. The very number and variations of such proposed findings preclude their discussion here one by one.

The Applicant and interveners and the staff supporting the application have advanced certain contentions as follows:

1. The Commission has jurisdiction to issue a license for Project No. 2009. Section 10 of the Flood Control Act of 1944 does not preclude private development of the Roanoke Rapids

site. Although, in the Act, Congress approved the comprehensive plan for the development of the Roanoke River Basin, it did not authorize Federal construction of the Roanoke Rapids project, while it did authorize and appropriate for two others of the developments proposed in the comprehensive plan. Congress was aware of its prior legislation with respect to water resources, including the Federal Water Power Act of 1920 [5435] and the Federal Power Act arising from amendments of the original Act in 1935, and there is nothing to indicate that the licensing authority of the Commission has been suspended with respect to any project not expressly authorized for construction by the United States.

2. In the circumstances presented by this application there is no sound basis for judgment and a finding by the Commission that the Roanoke Rapids development should be undertaken by the United States itself. The earliest development of the water resources at Roanoke Rapids will be achieved by the issuance of a license to the Applicant under the terms and safeguards of a Federal license because there is no way of determining when the United States would undertake such development, or even if it would undertake such development at any time.

3. The plans of the Applicant are "best adapted to a comprehensive plan" for improvement and utilization of the water resources of the Roanoke River Basin because they are in complete harmony with the Congressionally approved basin plan. Any variation between the plans as proposed by this Applicant and the over-all basin plan as approved by Congress is very minor and actually represents an improvement in that the Applicant's up-to-date plans provide the more complete utilization of the water resources at the Roanoke Rapids site.

[5436] There are other contentions made by the proponents, to which the Presiding Examiner has given close attention but which, it would seem, are not particularly material or individually determinative. For example, the fact that the Roanoke Rapids project is purely hydroelectric, rather than multiple-purpose, does not mean necessarily that the United

States should not undertake its development.[6] The fact that this Applicant is in dire need of additional sources of electric energy to meet its growing load does not mean that if the application fails to meet the proper and customary tests, it nevertheless should be granted a license. These are only random examples of contentions which seem to lack determinative calibre.

There is also the contention already referred to, that the Commission's letter of May 3, 1944, does not constitute a finding under Section 7 (b). Such contention, of course, was made to counter a contrary contention made by those opposing the application.

Those opposing the application have advanced these contentions:

1. The Commission is without jurisdiction to issue [5437] a license for non-Federal[7] development of Roanoke Rapids because, they allege, "Congress by section 10 of the Flood Control Act of 1944 reserved the development of the Roanoke River Basin for the United States itself;" (Sec. Br. p. 11). In the 1944 Act, the Congress approved the over-all plan which included Roanoke Rapids and authorized the construction of the first two steps of the plan, in accordance with the recommendation of the Corps of Engineers which had recommended development by the United States of the eleven basin projects on a step-by-step basis, with two of the projects to be undertaken immediately. This approval of the Congress, they argue, was not a gesture lacking significance, and this legislative act, read with the approved report comprising House Document 650, shows that the Congress has preempted, for the United States, all of the sites recommended for development.

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[6] According to the Army Engineers, the Hartwell Project on the Savannah River would be practically 97% hydroelectric. (See Gee, Hearings on Flood Control Act of 1949, House of Rep. 81st Cong. 1st Sess.)

[7] In this decision, the term "non-Federal" frequently is used interchangeably with the term "private" in the discussion of the licensing authority of the Commission. The Federal Power Act, in Section 4 (e) authorizes issuance of licenses to several non-Federal classes: citizens, associations of citizens, corporations, States and municipalities. The last-named term includes cities, counties, irrigation districts, drainage districts and other political subdivisions or agencies of the States (Sec. 3, (7)).

2. Concurrence by the Commission in the report and recommendations comprising House Document 650, evidenced by [5438] its letter dated May 3, 1944, constitutes a finding and recommendation by the Commission under Section 7 (b) that the development of these water resources at Roanoke Rapids should be undertaken by the United States itself, and the Commission having thus performed, once for all, its function under Section 7 (b), any further action on its part at this time, not consistent with such finding and recommendation would be without authority of law and contrary to the public interest.

3. The project proposed by the Applicant, "if constructed and operated under natural stream flow conditions would have no engineering feasibility and would be economically unsound;" and the Applicant "is seeking to take advantage of the huge amounts of money spent by the United States in developing the comprehensive plan and in constructing the Buggs Island Project. Even with Buggs Island in operation the project proposed by the Applicant would still be lacking in engineering feasibility and economic soundness, unless supported by a firm contract with the Secretary of the operation of the power pool at Buggs Island so as to contribute to the benefits of Roanoke Rapids. If downstream benefits are assessed against the project proposed by the Applicant, commensurate with the benefits it would receive from Buggs Island, the ownership and operation of Roanoke Rapids by the Applicant would not be economically feasible" (Sec. Br. p. 12).

4. The Applicant "can secure its power needs either from the Government or through the construction of an equivalent steam [5439] plant with a lesser amount of investment and at lesser annual charges than through the construction of the Roanoke Rapids project. On the other hand, the benefits to be derived by the United States and the people through the common ownership and operation by the United States of the projects of the entire river basin, including Roanoke Rapids, or of Buggs Island together with Roanoke Rapids, is so much greater than those from the ownership and operation of these projects without Roanoke Rapids that they exceed the benefits which could be assessed against Roanoke Rapids if owned and operated by the Applicant. Finally, the policies of Con-

gress and of the Secretary concerning the disposition of power from these projects must be a controlling consideration in the Commission's action on this application" (Sec. Br. pp. 12–13).

Motions to dismiss

The Secretary's contentions and substantially similar contentions by REA Association with respect to jurisdiction, are embodied in Motions to Dismiss which were filed with the Examiner and transmitted to the Commission for its decision during the opening days of the hearing. The Commission's decision to defer action on the motions until this matter in its entirety is reached for decision on the merits, was announced to all parties and counsel. Thus this decision necessarily will be a decision on the motions as well.

Interlocutory matters

The two interlocutory matters arose during the hearing and in the period since the close of the hearing. The first concerns the [5440] admissibility in evidence of a certain report of the District Engineer at Norfolk, Virginia, which appears to be largely the source data collected by that officer and submitted to the Chief of Engineers so that the latter could report to the Commission on the pending application in accordance with its request under the provisions of Section 4 (e). The admissibility of the document was attacked by REA Association in a motion to strike, on the ground that the submission of this report contravenes a directive by Congress in Section 6 of the Flood Control Act of 1936 prohibiting the making of supplemental or additional reports or estimates after the regular or formal reports are made as authorized by the Act. The Secretary supported this motion to strike but predicated his support on different grounds. It seems to be his position that if the report is considered as altering in any way the comprehensive plan approved by Congress, it is not competent as evidence in this proceeding. But it is not so considered here and it is entitled to a place in the record at least as background data for the official report of the Chief of Engineers which was submitted in accordance with the provisions of Section

4 (e) and admitted as evidence in this proceeding without objection.

The motion to strike Exhibit 11 is denied. The report of the District Engineer on this application was prepared in accordance with Section 4 (e) of the Federal Power Act. It is therefore competent evidence, its genuineness and good character not being challenged. Because of the subject matter it embraces, there can be no question as to its relevancy. It appears to satisfy the requirement of [5441] materiality. It remains in evidence. It appears clear that the prohibition contained in the Flood Control Act of 1936 cited by the opponents of the pending application was intended to cover only additional or supplementary reports to Congress itself and was not intended to restrict the preparation and submission of routine interagency reports and other information from other agencies to the Commission in accordance with existing law. This control by Congress of the preparation of reports and surveys on proposed public works before it for legislative consideration cannot be considered as restricting the Federal Power Commission in the obtaining of reliable, relevant and material information from whatever source legitimately available and offered in evidence to aid in making proper disposition of matters in hearing before it.

The second interlocutory matter to be disposed of relates to the material submitted by REA Association in its final or reply brief relative to the grant of a loan by the Rural Electrification Administration to a generation cooperative composed of the REA cooperatives who are members of the REA Association appearing as an intervener in this case. The brief contained a request that the record be opened to admit a certain press release by the Rural Electrification Administration announcing and giving certain details concerning the grant of the loan. Despite the necessity for denying the request to open the record at the stage then reached, it is considered that the matter of the grant of the loan publicly announced represents the formal, official action of a Federal agency pertinent to contentions [5442] made in the hearing touching issues in this proceeding and that such action is one that may be officially noticed. The following facts, the verity of which no

one has challenged, are, therefore, officially noticed and are considered in connection with the issues before us, to wit:

(a) On September 22, 1949, a $14,320,000 loan to the Old Dominion Power Cooperative of Chase City, Virginia, was approved by the Rural Electrification Administration, U. S. Department of Agriculture, to finance construction of a generation and transmission system to serve 11 REA-financed distribution cooperatives in the State of Virginia.

(b) No funds will be advanced to the borrower until it has obtained the approval of the Virginia Corporation Commission.

(c) The loan will provide $6,526,000 for construction of a 34,500 kw. steam generating plant on the James River near Scottsville, Virginia, and $7,794,000 for construction of 888 miles of new transmission line (largely 69 kv.) substations, and other transmission facilities.

(d) The purpose of the steam generating plant is to provide a source of firm energy for the loads of the 11 transmission cooperatives in order that additional electric energy may be made available to the cooperatives from hydroelectric projects on the Roanoke, Rappahannock, and Jackson Rivers when and if such projects are authorized and constructed by the United States.

[5443]

DISCUSSION OF THE EVIDENCE AND CONCLUSIONS

Jurisdiction

It is concluded on the basis of all of the evidence and the record before the Examiner that the Commission has jurisdiction to entertain an application for license for construction, operation and maintenance of a hydroelectric project at the Roanoke Rapids site on the Roanoke River, and to issue an appropriate license therefor to a non-Federal or private interest.

All of the evidence submitted by the parties on this question has been carefully studied. The arguments and briefs have

been carefully considered. The legislative history has been explored to discover the true intent of the law-making authority.

The answer to the question of jurisdiction depends upon the intent of the Congress in its enactment of the Flood Control Act of 1944.

It is desired to express here genuine appreciation of the assistance given the Examiner by able counsel for the parties in their briefs. The question of jurisdiction has not been altogether easy to decide because, principally, of the fact that the legislative use of terms which at times or in part have a common meaning and at other times or in part have different meanings, has not always been uniform, clear or definite as to intent. An earnest effort has been made to discover what was in the mind of the legislators and particularly with reference to whether or not it was intended to reserve, for [5444] construction by the United States itself, all the proposed units of development embraced in the comprehensive plan or only those expressly "authorized" or appropriated for. This Commission is the creature of the Congress and exercises a segment of legislative authority by express delegation and authorization. Certainly, it is farthest from our inclination or desire, to obscure or flout by specious reasoning or verbal hair-splitting, the true legislative intent. In connection with the comprehensive plan submitted by the Army Chief of Engineers, for the Roanoke River Basin, Congress used the word "approved." In connection with two multipurpose projects in that plan, Buggs Island and Philpott, to be appropriated for, Congress used the word "authorized." The Applicant and those who support its view, contend that the two words are not synonymous in meaning and that Congress did not intend that they be considered so. Those opposing the application, contend that, in legal effect, the two words have the same meaning and are interchangeable. On the one hand, they say that if the words were not meant to convey the same meaning and legal implications, if Congress did not contemplate long range development by the United States of each and every unit therein contained, what purpose could that body have had in approving the comprehensive plan? On the other hand, say the proponents of

the application, surely Congress did not intend that such of the public benefits from these valuable water resources as it did not desire to develop and utilize immediately or in the near future should be unrealized and the water wasted to the sea for an indefinite period.

[5445] Forceful arguments have been made for each view. The legislative history and practice have been studied. The intent of the use of the word "authorize" as pertinent in the instant proceeding has become reasonably clear. It may be true that the Commission is without authority, in the absence of some sort of Congressional clearance, to issue a license for a project which has been "authorized," even if no appropriation has yet been made for such project. It appears far from true, however, that "approval" of a general basin plan, without authorization and without appropriation for development of certain of the sites while authorizing and appropriating for others, constitutes a preemption or reservation by Congress for federal development of those sites in the comprehensive plan approved for the basin which have neither been appropriated for nor authorized.

One looks in vain in the 1944 Flood Control Act for anything that would indicate a purpose to preclude or bar non-Federal development of water resources in the Roanoke River Basin for an indefinite number of years to come, especially where, as here, there is immediate need and market for additional capacity and energy. It must be assumed that Congress was aware at the time it enacted this Flood Control Act of 1944 that The Federal Water Power Act of 1920, passed after years of stormy debate, provided for development of the nation's water resources by non-Federal interests under the strict surveillance of the Commission and, where navigable waters were affected, under the close supervision of the Chief of Engineers, Department of the Army, as well. The Congress it appears, gives its approval to a comprehensive [5446] basin plan for the full physical development of the water resources of a river basin for the purposes prescribed by law, so that if and when the development by the United States of any of the projects named therein appears desirable, it can act with a minimum of delay. If, in the meantime, non-Federal interests show

themselves ready to undertake under Federal supervision and substantially in harmony with the approved comprehensive plan, the immediate development of any of the proposed sites not authorized or appropriated for, they may seek the necessary authorization by federal license from the agency of Congress authorized to issue such licenses, to wit: the Federal Power Commission. This seems reasonable. Development by non-Federal interests of water resources under the conditions of a license was provided for by Congress almost a quarter of a century before the enactment of this 1944 Act and this licensing statute was designed to afford maximum protection of the public interest while permitting private investment and encouraging seasonable development of needed energy from waters which might otherwise be wasted. Had Congress intended, in the 1944 Act, to suspend or withdraw the licensing powers of the Commission with respect to this basin, it could have accomplished such result easily. It has done the like before [8].

[5447] A study of prior legislation has not been particularly helpful, because this precise problem (an application for a Congressionally unauthorized project within an "approved comprehensive plan") has not arisen before. Congress has, however, approved another general plan and has authorized Federal development of a portion of that plan on at least one other river—the Savannah. The legislation with respect to the Savannah is the same, for practical purposes, as the legislation with respect to the Roanoke. Of 11 approved units of a comprehensive plan for the Savannah River Basin, but one, the Clark Hill project, has been authorized. Authorization for a second unit, the Hartwell project, has been sought but has not been granted. There are no applications now pending before the Commission for license for any of the units embraced by the Savannah River plan. Two units of the Roanoke River Basin plan have been authorized as an initial step—Buggs Island and Philpott—and authorization has been sought for a

[8] Cf. Boulder Canyon Project Act, 45 Stat. 1057, 1062: "The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries * * *."

third—Smith Mountain. But if approval of a comprehensive plan is tantamount to authorization by Congress—why have separate authorizations been sought for Smith Mountain and Hartwell? The answer is that Congress has yet to authorize construction of either unit in either basin and in fact has "authorized" and reserved for Federal construction only the Buggs Island and Philpott developments on the Roanoke and Clark Hill on the Savannah.

The hearings before the Committee on Public Works, House of Representatives, 81st Congress, 1st Session, on Title II of the Flood Control Act of 1949, brought out interesting and informative material [5448] on this question. The portions of the hearings of greatest interest so far as this case is concerned are those on bills seeking authorization for the Hartwell project on the Savannah and Smith Mountain on the Roanoke, which, as has been pointed out, are units of Army-conceived comprehensive plans for the river basins involved, such over-all plans having been "approved" by Congress but only partially authorized in the same manner. Appearing at these hearings at the request of the Committee of the House, was Major General Lewis A. Pick, Chief of Engineers, Department of the Army, and Lt. Col. Herbert C. Gee, Deputy Chief of Civil Works for Flood Control of the Corps of Engineers, designated by General Pick as official spokesman for the Corps. The statements of the members of the Congressional Committee and these high Army officials are illuminating—and very pertinent. Observe the following, quoted from their statements:

STATEMENT OF MAJ. GEN. LEWIS A. PICK, CHIEF OF ENGINEERS, UNITED STATES ARMY[9]

General PICK. * * * I am honored to appear before you * * *. I am prepared to make a general statement * * * and my assistants from the civil works division of my office will be prepared to furnish you with information on individual projects and on other matters which this committee

[9] Hearings before the Committee on Public Works, House of Representatives, 81st Congress, 1st Session on H. R. 5472 (Title II) authorizing the construction, repair, and preservation of certain public works on rivers and harbors for navigation, flood control, soil conservation, and for other purposes (Flood Control Act of 1949), May 16–June 2, 1949.

may desire to consider in connection [5449] with the flood control program. * * * Colonel Gee, who will testify specifically on the individual projects and basins * * * will be available to answer any questions and to assist the committee. * * *

* * * * * * *

Mr. ANGELL. * * * I regret that you are not going to be here when our Columbia Basin project comes up. * * * Now, General, as I understand it, your over-all program for the development of the Columbia Basin area and its tributaries calls for the construction of works throughout the area * * * Will you state under what authorization this comprehensive plan was made?

* * * * * * *

General PICK. It was as a result of a resolution by both committees of Congress, the House and the Senate, for a review of our 308 report. * * * There were two letters * * * from the President * * * urging the Corps of Engineers * * * to push their plans through * * *.

Mr. ANGELL. So that this report on plan 308, this comprehensive plan made by the Corps of Engineers is not only in response to the resolutions, * * * but also in response to the urgent appeal of the President * * *?

General PICK. Yes, sir.

* * * * * * *

Mr. ANGELL. Is it true that notwithstanding the fact there are programs and legislation in the Congress for the establishment of a Columbia Valley Authority, that that does not in any way counter, or interfere with this comprehensive plan that you are submitting to the Congress?

General PICK. No, sir. This is an engineering plan and it could be carried out by any administrative set-up that might be put in charge of it. We have done the engineering work. We have assembled the engineering data. We have the factual data [5450] necessary for providing a comprehensive plan for a large river basin system and that is what this report is. It has been thoroughly studied and the data has been col-

lected, which would allow the work to be undertaken just as soon as funds could be made available for carrying it out.

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STATEMENT OF LT. COL. HERBERT C. GEE, CORPS OF ENGINEERS

* * * * * *

The CHAIRMAN. You were testifying about this matter under H. R. 2283 [Hartwell Reservoir on the Savannah River.] * * *

Colonel GEE. The project is a part of the approved plan, sir.

The CHAIRMAN. What do you mean by that to say, let us understand what you mean. Is not the word "approved" an authorization for the plan but without appropriation, or without an authorization for the appropriation?

What is the difference between approving and authorizing a plan?

Colonel GEE. We have never construed the approval of the plan to carry with it the authorization to construct the elements of that plan.

The CHAIRMAN. Nor do we. Is it not always necessary under the Act of 1944, in order to provide for Hartwell or any other reservoir, to increase the authorization from $36,500,000 to enough to build another dam and complete that dam? Without anything further?

Colonel GEE. That is correct, sir.

The CHAIRMAN. So that plan has this reservoir which has already been approved; is that right?

* * * * * *

[5451] Colonel GEE. Yes, sir.

The CHAIRMAN. We approved the entire plan, approved all the 11 of these reservoirs and authorized Clark Hill?

Colonel GEE. That is correct, sir.

The CHAIRMAN. So all you have to do to provide for Hartwell or other dams is to increase the authorization sufficient to provide for another dam after you have completed the Clark Hill Dam.

Colonel GEE. That is correct, sir.

* * * * * *

The CHAIRMAN. * * * Colonel Gee, the general plan for the Savannah River having been approved, the only thing that is necessary in order to provide for the construction of other dams and reservoirs under that plan is additional authorization and if it is desired that that authorization be applied to any one dam it can be so stated in additional authorization, is that true?

Colonel GEE. That is correct, sir.

* * * * *

Roanoke River, Smith Mountain Dam, Va.

Mr. DAVIS. (Acting Chairman) Colonel Gee, will you present this project? May I say at the outset that Mr. Dondero may be interested in the development of this project. I am informed that in view of discussion on the Clark Hill project yesterday and the Hartwell—it is expected that the eight or nine dams for power purposes in the Savannah River are very likely to be utilized by private industry and I think Mr. Dondero should get some satisfaction out of this, and I say that with all deference to everybody concerned. If the Federal Government is under obligation to assume a greater share of the expense in providing for a multipurpose service up the river, then after that has been done, down the river, say in these 9 cases, private industry could then come in and build the power establishments to take care of the needs of that area. I think we are getting [5452] somewhere. And that was developed, Mr. Dondero, in the statements yesterday, when the first two projects, Clark Hill and Hartwell, are developed, the excess cost maintained by the public at large provides an opportunity for private industry to go ahead and proceed in an orderly way under our system of private enterprise.

* * * * *

Mr. DAVIS. * * * Colonel Gee, will you please proceed?

Colonel GEE. Mr. Chairman, there are two bills * * * both of which are for the purpose of permitting the construction of Smith Mountain project, one of the 11 projects included in the approved plan for the development of the Roanoke River Basin. * * * Mr. Chairman, I would like to point out at this time that the authorizing of construction on the Smith

Mountain project represents a deviation from the original recommendations of the Chief of Engineers when this basin plan was authorized. The reason for that deviation, as I have previously inferred, is that it is the third project.

Since the development of Buggs Island has begun, a private utility company has filed an application with the Federal Power Commission to develop the Roanoke Rapids project. This development of the Roanoke Rapids project is to be exactly in accordance with the project as recommended by the Chief of Engineers in this document. The hearings were conducted by the Federal Power Commission last week on that application. We have no information as to the outcome of those hearings. That project was the third project recommended in the original report of the Chief of Engineers.

The fourth project, the Gaston, it is believed that a private utility company will file an application for the construction of that project in the near future.

Mr. DONDERO. Do I understand that this explanation you are making, Colonel, is in relation to the Smith Mountain Dam proposal before us this morning?

[5453] Colonel GEE. That is correct, sir.

Mr. DONDERO. In other words, you mean to say that private power companies have made application for the right to build these dams and construct the necessary power facilities rather than the Federal Government?

Colonel GEE. Yes, sir; the Roanoke Rapids.

Mr. DONDERO. Part of the Roanoke River Basin.

Colonel GEE. One of the 11 recommended and now approved plans for the basin, sir.

Mr. DONDERO. What is the other one you mention?

Colonel GEE. The Gaston site, sir.

* * * * *

Mr. PICKETT. I understand in the over-all comprehensive plan that you have proposed 11 reservoir structures, only three of which have any part of their purpose to be flood control.

Colonel GEE. That is correct, sir.

Mr. PICKETT. And those three are Philpott, Buggs Island, and Smith Mountain.

Colonel GEE. Yes, sir.

Mr. PICKETT. Smith Mountain is the one presently under consideration, and you have under authorization and construction both Philpott and Buggs Island.

Colonel GEE. That is correct, sir. * * * We would be remiss in our duty as engineers serving the Congress if we did not point out to you the potentialities of the Roanoke River Basin. We have said in the report that the building of 3 of these 11 projects will produce all of that flood control which we believe to be economically justified, that the remaining 8 are straight power projects, and if it is desired that power projects be built by the Federal Government, we believe these are the sites [5454] best adapted to that purpose, and this is approximately what it will cost to develop the full capabilities of that river basin.

* * * * * *

Mr. ANGELL. Is the Federal Government at the present time planning to develop any of those dams on the lower part of the river which are devoted exclusively to power production?

Colonel GEE. No, sir. They have the same status in this basin plan as the eight remaining projects. They are part of the approved plan. Their being in that plan certainly is no bar to a private utility company coming in and seeking to develop one of these projects.

Mr. ANGELL. And that is what is being done now.

Colonel GEE. That is being done now at Roanoke Rapids, sir.

* * * * * *

Mr. FORD. Colonel, you have testified that one of the private power companies has made application to the Federal Power Commission for permission to install a dam at Roanoke.

Colonel GEE. Yes, sir.

Mr. FORD. And you have indicated there is a possibility that another power company will make a similar application at another authorized site.

Colonel GEE. Yes, sir.

Mr. FORD. Would those two applications not be made if there was not some possibility that the Smith Mountain Reservoir would be built?

Colonel GEE. Those applications are being filed principally because the Buggs Island Dam is under construction. They

are both below Buggs Island and the greatest benefit is derived at those sites from the waters stored in the Buggs Island Reservoir. The benefits from Smith Mountain would be very small as compared with the Buggs Island benefit at the Roanoke Rapids site.

* * * * *

[5455] Mr. PICKETT. Colonel, assuming that some presently existing utility company should appear at the Power Commission and now make an application to construct the Smith Mountain Dam, what would be the attitude of the Corps of Engineers on it?

Colonel GEE. The Corps of Engineers would be given an opportunity by the Federal Power Commission to review the plans of that utility company, and in reviewing those plans we would insist that the structure itself would do those things which we believe necessary to be done in developing the site fully; secondly, that their method of operation would not make conditions worse on the river. In other words, sudden fluctuations of water releases produce greater damage than the heavy seasonal floods on some streams. There would have to be a set of regulations included in the permit issued to this company, which would restrict their operations so that they would not do damage to property owners downstream.

Mr. PICKETT. Then your position is not that of just resistance to the theory that private companies might build this structure if it conforms to the benefits of the general over-all plan that you are already in the process of developing; is that right?

Colonel GEE. That is correct, sir.

Mr. PICKETT. Thank you.

The CHAIRMAN. Colonel, under the Flood Control Act of 1944, the general plan, including the 11 dams, was approved and the construction of only 2 of those dams—to wit, the Buggs Island and the Philpott—were authorized at an estimated cost of $35,140,000.

Colonel GEE. That is correct, sir.

The CHAIRMAN. Now, does that not mean—that language—that any reservoirs except the two named are authorized in the Act of '44?

[5456] Colonel GEE. That language means that the general plan, including 11 reservoirs, has the approval of the Congress.

The CHAIRMAN. Does that mean—that language—that the 11 reservoirs are authorized?

Colonel GEE. No, sir.

The CHAIRMAN. I don't understand the language of the Act. I want to get that clear, because this language is a little bit unusual as compared with other language, and I want to get the construction of your office.

Colonel GEE. It has been the interpretation of our office that those two projects are the only authorized projects in the Roanoke River Basin.

* * * * *

Colonel GEE. * * * you have our recommendation as of this morning, that in view of the fact that a private utility company is now seeking to build the Roanoke Rapids Dam, and we believe a similar application will be filed on the Gaston site, that it is our feeling the Federal Government should not attempt to compete and build these straight-power projects.

The CHAIRMAN. But the fact of the matter is there has been no modification of this report, and that is the statement that you make to the committee in the light of subsequent developments.

Colonel GEE. Yes, sir.

The CHAIRMAN. And it presents a very interesting question as to whether the Government is going to build a unit and then private power build a second and a third and the Government come along and build a fourth. What is the justification for the Government to do that if those two individual units that come between are really to get a benefit that they wouldn't get if they were building those projects in the first instance?

[5457] Colonel GEE. Any benefit which they derive from the building of the multiple-purpose projects we have been discussing will have to be paid for on an annual basis by the private companies who build these projects.

The CHAIRMAN. Under what law?

Colonel GEE. Under Section 10 (f) of the law which created the Federal Power Commission and charged them with the

responsibility for protecting the Federal interest and the interests of licensed private organizations concerned in hydroelectric developments throughout the Nation.

The attitude and understanding of the Department of the Army respecting the intent of Congress and the meaning of the Flood Control Act of 1944 can be seen clearly in the statements of its official spokesman. The Department of the Army's Corps of Engineers—the agency entrusted by Congress after Congress and session after session down through the years with the task of investigating and surveying and submitting recommendations for important river and harbor improvements and continuously through the years charged with the task of executing many of the laws of Congress with respect to construction, operation, and maintenance of such improvements—thus working closely and intimately year by year with the Committees of Congress in charge of such matters—has opportunity excelling that of all others to learn and to know the intent of the legislative body and the true interpretation and meanings of the words customarily and by practice used by Congress in the bills and acts dealing with the surveys and plans submitted by the Corps as a basis for legislation.

[5458] This much is certain. The Corps of Engineers does not regard a project as "authorized" if it is only part of an "approved" comprehensive plan. Colonel Gee made it clear that so far as the Department of the Army is concerned, none of the Roanoke River units other than Buggs Island and Philpott is "authorized." Note that Colonel Gee said: "We have never construed the approval of the plan to carry with it the authorization to construct the elements of that plan," and the Chairman of the House Committee, presiding, there added, "Neither do we." As we have seen, this spokesman for the Department of the Army, Colonel Gee, also told the Committee than non-Federal development of some of the units of this comprehensive plan approved by Congress could be expected. It is interesting to note that this officer seemed to consider it within the realm of possibility under the law, that the development of even the Smith Mountain project could be undertaken by a private company—although this project contains flood control features—and although there were bills before Congress

seeking to provide authorization for Federal construction of this project even as he spoke. Colonel Gee explained that any license issued for Smith Mountain to private interests necessarily would contain provisions carrying out the flood control requirements determined by the Corps of Engineers to be necessary. The discussion of the Roanoke Rapids site, including the statement by Colonel Gee that an application for its development was before the Federal Power Commission while he testified, is very illuminating. Neither Colonel Gee nor any of the Committee [5459] members indicated that he saw any impropriety in the Commission's consideration or the possible granting of the application. It seems certain that this would not have been the case if the members of the Committee of Congress had believed or interpreted the Flood Control Act of 1944 to mean that the Roanoke Rapids project had been authorized or reserved by that Act for development by the United States, as the able opponents of the pending application have earnestly contended.

The statements made at the hearing before the Committee lead to the conclusion that the Department of the Army does not regard its report comprising House Document No. 650 as a recommendation that all of the units of the Roanoke River comprehensive development plan be constructed, operated and maintained by the Federal Government. The report in House Document No. 650 (like the Army's Columbia Basin Report described by General Pick) is no more than a revision of previous reports by that Department—and particularly the basic "308 Report." The original outline in House Document No. 308, 69th Congress, 1st Session, for comprehensive river basin reports—the same outline followed by the Department of the Army in the submission of all so-called "308 reports" since—unquestionably contemplates investigations and surveys the results of which may be utilized by Congress in authorizing projects, or in requesting further studies. It is also true that the outline contemplated that the valuable engineering data contained in the "308 reports" can be utilized by non-Federal or private parties seeking to develop the water resources involved as contemplated by the Federal Power Act (i. e., under Federal [5460] license for a limited period of years with pro-

vision for recapture by the United States on fair terms at the end of the license period, if then desired). House Document No. 650 is really in substance a revised "308 report" for the Roanoke River Basin and the "approval" of Congress of the plan contained in it is no more than an expression by that body to the effect that the development of the basin whether by the United States, by private business, or by both, must be along certain general lines. Possession by Congress of such an up-to-date "308 report" is of distinct value in its determination of whether or not any of the projects embraced by the report should be undertaken with public funds.

It has been urged that the Congress could not have intended to construct the "expensive" projects and to release "cheap" projects for non-Federal development. One intervener has referred to this as a surrender by the Government of power benefits of great proportions, benefits which should be reserved by the United States for consumers, resulting, in effect, in an applicant for license being permitted to pick up and keep as its own "the apples which the United States has, at great cost, shaken from the tree." Such suggestion overlooks the fact that the United States, like any upstream developer, is entitled to and under the Federal Power Act will receive, equitable payments for the headwater benefits received from Federal upstream construction by any downstream power producer, in conformity with a formula laid down by Congress. As we have seen, this very [5461] question occurred to the members of the Congressional Committee during the hearings (excerpts from which have been set forth *supra*). Colonel Gee reassured the Committee that such reimbursement must be made as required by law.

It has been sought to make much of the fact that the precise development of Roanoke Rapids proposed by the Applicant differs in some respect from the comprehensive plan contained in House Document No. 650, and the contention has been made that the plans as set forth in that House Document have been, in effect, legally "frozen" so that any development by the Applicant herein varying from the plan in the Army report will constitute a disregard for the action of Congress, if not a violation of law. The difference between the project as out-

lined in House Document No. 650 and the project proposed by the Applicant is not significant, in the view of the Department of the Army. Colonel Gee said "This development of the Roanoke Rapids project is to be exactly in accordance with the project as recommended by the Chief of Engineers in this document" (House Doc. 650). General Pick, Chief of Engineers, speaking to the Committee, said, in answer to a question as to whether or not the Corps of Engineers itself had authority under existing law to change a project once it had been authorized (a stage which the Roanoke Rapids project has not attained):

> If we were to select a dam, for instance, at a particular point on a stream and investigating that foundation we would find that the foundation there was not as good as it was downstream a little ways or upstream a little ways and that the building of that reservoir at either one of those new locations [5462] would accomplish the same purpose, we do have that authority, that amount of leeway. We do not have authority to move a project from one stream to another. We do not have authority to go very much beyond the area that Congress has authorized us to build a structure, to build a reservoir.[10]

The Department of the Army has reported under Section 4 (e) on the application involved herein. It has stated that its studies "indicate that the Power Company's plan proposed in the amended application is satisfactory for development of the water resources of this reach of the Roanoke River," notwithstanding the fact that it varies slightly from the exact plans for the Roanoke Rapids site contained in House Document No. 650. The plans of the Applicant, it is concluded on the whole, represent substantially, the Roanoke Rapids project as described in the House Document 650. Such difference as exists does no violence to the comprehensive plan of the Chief of Engineers as "approved" by the Congress.

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[10] Hearings on the Flood Control Act of 1949 (Title II) cited *supra*, page 33, *fn.* 9.

It is interesting to note that the Smith Mountain Dam was fourth in the list of projects for step-by-step development in the comprehensive plan as presented by the Army Department District Engineer and embraced in House Document No. 650. Buggs Island was first in his list and Philpott, on a tributary of the Roanoke, was ninth. In 1944, the Chief of Engineers while concurring generally in this basic plan recommended its alteration so that Buggs Island (No. 1) [5463] and Philpott (No. 9) would be authorized as the initial steps (Nos. 1 and 2). Presumably, if the United States were to follow and carry out the master plan without further change, Roanoke Rapids and Gaston should follow the construction of Buggs Island and Philpott, rather than Smith Mountain, which is farther down the list even in the order of development as modified by the Chief of Engineers and as finally approved in 1944. We have seen that when the Chairman of the House Committee inquired as to the reason for the Army's change in recommendation in 1949 as to order of building, Colonel Gee, for the Chief of Engineers, admitting that his Department had changed its recommendation, ascribed the change to the fact that Smith Mountain is the only remaining flood control dam. But, it seems that the fact that the Applicant here had applied to the Commission for authorization to build the Roanoke Rapids project and the further fact that it was expected that a non-Federal or private party would file an application seeking license to build the Gaston project, may have played some part in the change, Colonel Gee pointing out that the remaining eight projects are straight power projects.[11] The propriety of this change of recommendation, discussed in the same breath, as it were, with this application, was not questioned by the members of the Committee. The fact that if Smith Mountain should be authorized by Congress thereafter, such authorization would further rearrange the step-by-step [5464] order of the development originally set forth in the Congressionally-approved Army plan, did not appear to disturb anyone.

Careful consideration has been given to the view that the Commission has already performed its function under Section

[11] Hearings on the Flood Control Act of 1942 (Title II) *supra*, p. 38.

7 (b) of the Act and to the facts and circumstances in which the Commission's letter of May 3, 1944, was written as well as to its contents. We are not able to agree with those who argue that this letter amounted to a finding and recommendation under Section 7 (b) of the Act.

True, the letter approved the comprehensive plan of the Army Engineers, (with certain suggestions for design modifications) as a plan for an efficient physical development of the Roanoke River Valley for the purposes prescribed by law; but the comprehensive plan was not this Commission's plan developed om its own "examinations, surveys, reports, plans, and estimates of cost," [12] as would have been true if the Commission had acted under Section 7 (b). And, there has been no submission of a finding and recommendation to Congress by the Commission that the United States itself should undertake the development of the Roanoke Rapids site. The May 3, 1944, letter was clearly a reply to a letter from the Chief of Engineers requesting "comments". It is obvious that Section 7 (b) calls for submission of findings and recommendations directly to Congress (usually with respect to a particular or individual development for which a license is sought) and not in the form of comments on a comprehensive plan covering an entire [5465] river basin, which has been proposed by others. The Commission's letter was not addressed either to the Congress or to an officer or a Committee of the Congress. There is a presumption, which has not been overcome, that the Commission performs its function in accordance with the directives in the laws it administers and not indirectly or covertly.

It must be and is concluded that Congress has not reserved or authorized the Roanoke Rapids project for development by the United States, that the Commission has not yet performed its function under Section 7 (b), and that it still has jurisdiction to entertain the pending application and to issue a license for the said project provided the requisite findings of fact upon the merits can be made upon the record.

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[12] Quoted from Section 7 (b).

[5466] Should the Roanoke Rapids project be constructed by the United States itself?

Jurisdiction having been found, the next issue to be determined in this proceeding is whether or not upon the record in this proceeding, it should be found that the development of the water resources at the Roanoke Rapids site should be undertaken by the United States itself. Under Section 7 (b) of the Act, this is a question which must be determined by the Commission upon consideration of any application seeking license to develop any water resources under the terms of the Federal Power Act.

It has already been concluded that the Commission has not heretofore performed its function of deciding that question.

Those opposing the pending application argue that a finding should now be made upon the record in this case that development of the Roanoke Rapids site with Federal funds would be in the public interest and that a recommendation for Federal construction should be submitted to the Congress under Section 7 (b) of the Act.

The bases of their argument seem to be (1) The Roanoke Rapids site is the most valuable of all of the proposed sites included in the comprehensive plan formulated by the Corps of Engineers, from a dollar-investment standpoint; (2) The financial success of the comprehensive plan will be jeopardized, if not doomed, if the United States releases this site for private development because, it is alleged, the benefit-to-cost ratio of the over-all plan will become so unfavorable as to discourage eventual development by the United States of the less valuable sites included in the comprehensive plan; (3) If [5467] a private developer of the Roanoke Rapids site is required to reimburse the United States for headwater benefits from the Buggs Island Reservoir in accordance with the true benefits received, the Roanoke Rapids plant will be an uneconomic investment for that private developer; and (4) Payment of any headwater benefits charges of a lesser amount than a figure representing actual benefits will deprive the United States of a substantial portion of the income it is entitled to receive from the Buggs Island Reservoir, and will amount, in practical effect, to subsidizing a private corporation by the taxpayers of the United States. Such subsidy, it is alleged, is not in the public interest.

It is contended further that if the United States should build Roanoke Rapids, it would market the energy therefrom at lower rates than the Applicant would or could afford to sell it because, they assert, the Applicant's primary interest is in the welfare of its investors and the Secretary's primary interest is in the welfare of the consuming public. It is not believed that the question of the public interest can be correctly answered thus simply and dogmatically. To undertake to do so would be to ignore vital factors and obvious truths. Investors may be consumers and consumers are often investors. The public interest embraces both classes and depends not alone upon the comparative direct benefits to one group of citizens or another but also [5468] upon other effects important to our economy, our government and to the whole population.[13]

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[13] The need for balance between diverse elements in our economic picture was forcefully set forth by the President in his Address to Congress on January 4, 1950 (House Document No. 389, 81st Cong., 2d Sess.; 96 Cong. Record 62-66) and again in The Economic Report of the President, transmitted to the Congress, on January 6, 1950 (House Doc. No. 388). In the January 4th adress, the President said:

"These gains [increase in average family income, etc.] cannot be achieved unless our businessmen maintain their spirit of initiative and enterprise and operate in a competitive economic system * * * Businessmen must continue to have the incentives necessary for investment and for the development of new lines of enterprise. * * * As our national production increases * * * the number of independent and competing enterprises should also increase. If the number does not increase, our constantly growing economy will fall under the control of a few dominant economic groups whose powers will be so great that they will be a challenge to democratic institutions."

In the January 6th Report, the President said:

"This effective teamwork between free enterprise and Government confounded the enemies of freedom who waited eagerly, during 1949, for the collapse of the American economy. * * * If we are to use all these resources [technology, productive facilities and labor] we must tap the dynamic forces of expansion within the American economy. One of the most important of these dynamic forces is the process of business investment, by which productive capacity is enlarged and improved. * * * [Then, noting the decline in business investment in 1949] There is no need for this decline to continue. There are immense opportunities for business investment in nearly every segment of the economy. There are in general sufficient funds available to businessmen who want to seize these opportunities. The initiative of businessmen, aided by proper Government policies, can and should soon reverse the trend of business investment. * * *

[5469] It may well be that in dealing with the matter in practical fashion, it should be considered in the light of whether there is any lively probability that the Congress would, upon our recommendation, authorize appropriation of public funds for the development of Roanoke Rapids within any reasonable, foreseeable time. All arguments for recommendation for Federal development would seem to be premised upon an assumption for which no basis can be found in the record—that the United States will in fact build Roanoke Rapids within some reasonable, foreseeable time, if no Federal license is issued to a private or non-Federal applicant. The contrary appears to be the fact. The probability is that so far as the United States is concerned, the water resources at Roanoke Rapids are destined to be undeveloped and unutilized for a long time to come. It is not believed that such wastage or nonutilization [5470] of water resources can be in the public interest, particularly when there is a need for the energy in the area and a private developer with private capital stands ready, willing and able to utilize them, with the protection of the public interest furnished by the terms and conditions of a Federal license.

While Roanoke Rapids was number three on the list of projects for step-by-step development of the basin, as set forth in the House Document No. 650, the Corps of Engineers which prepared that recommendation has now recommended that the

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If we are to continue our economic growth the major economic groups must all pull together—businessmen, wage earners, and farmers must work toward the same ends. Government, in turn, must carry out the aspirations of the whole people. * * * Businessmen should base their investment policies on confidence in growth * * *.

"To promote an environment in which businessmen, labor, and farmers can act most effectively to achieve steady economic growth is a major task of the Government. It must perfect measures for helping to stabilize the economy. It must build up the natural resources which are essential to economic progress, and expand the protective measures against human insecurity. It must keep open the channels of competition, * * * and encourage expanded opportunities for private initiative. * * *

"Under our system, private and public policies go hand in hand. Private economic policies provide motive power to the economy. Public economic policies provide the framework for economic activity. Sound plans for our future growth must take account of both, and blend them to achieve maximum effectiveness. * * *"

The President, in this Report, reiterated his concern with respect to the downward trend of private investment.

project originally set forth as number four—Smith Mountain—take precedence over the others preceding it in the original list. Thus it appears that the order of precedence is far from fixed, so far as the Corps is concerned, and Roanoke Rapids, as a purely hydroelectric project in the comprehensive plan which has flood control as its primary and paramount objective, is little likely to receive any preference or early authorization. If a non-Federal developer with private capital to be invested is not permitted to proceed at once with the development of Roanoke Rapids, how many years must its development wait? On this point, the statements of the Department of the Army spokesman before the Committee of Congress are pertinent:

> Mr. PICKETT. Now, what is generally the idea of the Corps of Engineers as to the orderly course of development of the comprehensive plan, with a view of how many years it will require you to complete it if you had the money to proceed in keeping with the plan that you would like to follow?
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> Colonel GEE. If the Smith Mountain project should be authorized in this present session of the Congress, the earliest date for planning money would be next year. The [5471] earliest possible date for first construction money would be in 1952. It would take approximately four fiscal years to see the completion of that project, bringing it into the latter part of fiscal 1956. That would be the best possible speed you could expect to make on the construction of this project.
>
> Mr. PICKETT. You would require, then, something in the neighborhood of 15 to 20 years to complete the comprehensive plan if you just took them up in the course of an orderly procedure; is that right?
>
> Colonel GEE. The comprehensive plan might never be completed, Mr. Pickett, if the demand did not arise for the power generated by the remaining eight projects in the over-all plan. Their only justification is power. If the demand is not there, it would be a mistake to build them, either with Federal capital or with private capital.[14]

[14] From hearings on the Flood Control Act of 1949 (Title II) cited *supra* p. 33, fn. 9.

In passing upon this question, the realities of the situation cannot be ignored. The Commission has already expressed its view in a general way as to the desirability of development of the water resources of the Roanoke River Basin. Full development of water resources at the earliest practicable date to meet existing and immediate future needs has ever been a firm policy of the Commission.

Recommendations to Congress under Section 7 (b) must be made in the light of all available facts, and the facts respecting the Government's fiscal policy must be given considerable weight. The President, in his Budget Message to Congress dated January 3, 1949, told that body that new river basin projects should not be undertaken except where urgency was evident, and that the flood control program of the [5472] Corps of Engineers, involving the construction of major storage reservoirs, would be limited in the fiscal year 1950 almost entirely to continuation of work on projects started in prior years. On July 1, 1949, Director Frank Pace, Jr., of the Bureau of the Budget, Executive Office of the President, sent a letter to all agencies, containing a statement of the policies and assumptions which the President had determined upon to govern the preparation of budget estimates for the fiscal year 1951. It was stated therein:

> As a general policy, estimates for civil public construction and improvement projects already under way should allow only for the minimum rate of progress with due regard to logical order and timing of the work. * * * New authorized projects should be started only where the public need for them is so urgent that it is not in the national interest to postpone them. * * *

In the President's Address to Congress on the State of the Union, delivered on January 4, 1950, (cited *supra*) concern was expressed with respect to the lack of balance between income and expenditures, and the President said:

> To meet this situation I am proposing that Federal expenditures be held to the lowest levels consistent with our international requirements and the essential needs of economic growth and the well being of our people.

In the Message From the President of the United States—the Budget for 1951 (House Doc. No. 405, 81st Cong. 2nd Session; 96 Cong. Rec. 169–193) released on January 9, 1950, the President said:

> The detailed activities of Government agencies in all fields have been closely reviewed to eliminate all but the minimum operations required. * * * The progress made in this Budget in reversing the trend toward higher expendi-[5473]tures and in achieving a substantial reduction has been made possible only by the most vigorous application, in every area, of a policy of holding the numerous activities to essential levels.
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> The rise * * * in estimated civil public works expenditures, * * * reflects almost entirely the minimum requirements of projects and programs now under way. With respect to Federal public works in such fields as reclamation, flood control, and rivers and harbors, this Budget does not provide for starting any new projects despite the pressures that exist for initiating construction of a large number of additional projects which are already authorized.
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> * * * * * * *
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> The 1951 Budget provides for total expenditures of 2.2 billion dollars in this area [natural resources] an increase of 373 million dollars from 1950. Over one third of the total and of the increase is attributable to expenditures for atomic energy. The balance represents primarily the requirements of projects under way in the fields of flood control and reclamation. This Budget provides for no new projects in these areas. Despite the large number of highly meritorious projects which have already been authorized for construction, we should not at this time add to the present high level of commitments. * * *
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> * * * * * * *
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> * * * the flood control program of the Corps of Engineers, involving the construction of dams, power

> facilities, canals, channels, and levees, will be limited in 1951 to continuation of work on projects started in prior years. * * *

In view of these declarations of policy it is obvious that a recommendation to Congress for Federal construction of Roanoke Rapids—which not only has not been "started" but which has not yet even received authorization—would be futile, as well as inadvisable.

A recommendation to Congress under Section 7 (b), in the face of the more than probability that no early action would be taken by [5474] Congress as a result of such recommendation, would not only be inconsistent with the President's fiscal policy but would be inconsistent as well with the position announced by the Commission in its opinion (No. 183) issued November 10, 1949, in the *Matters of Fresno Irrigation District, Pacific Gas and Electric Company,* Project No. 1925; Projects Nos. 175 and 1988, where it rejected the proposition that certain California water resources should remain idle and unused in the face of an application by a private company which was ready to utilize the water resources under Federal license. In that proceeding, the facts differed somewhat from those here present. There was no Congressionally approved comprehensive plan involved but merely plans of the Bureau of Reclamation for future development by the United States through that Bureau. The Commission said:

> * * * The Bureau's plans are contingent upon many uncertain factors, such as adequate steam support and markets, and there is no assurance that a sound proposal can be prepared. Under these circumstances it does not appear to us to be in the public interest to allow these water resources to remain idle.
>
> As we have previously pointed out in other connections, while Congress has given to the Commission broad discretionary powers to delay utilization of water power resources where delay is found to be in the public interest, the Federal Power Act does not contemplate delay beyond the time when it is economically feasible to provide for construction with the safeguards of the

licensing conditions. In addition to the desirability of using water power whenever such use is more economical than the use of nonreplaceable fuels, the Commission must consider the effect of continued uncertainty upon the general public in the area affected.

A situation analogous in certain respects is presented by the facts of this case. Here, too, we have extreme improbability of development by the United States of Roanoke Rapids within any early [5475] forseeable time together with the availability of private capital anxious to proceed at once. We have here also an applicant which necessarily must make provision at once for future load requirements and which has only the alternative of construction of a steam-electric plant with dependence upon coal—a nonreplaceable fuel—subject to price advances in a rapidly changing economic picture.

Since it is apparent that energy from the Roanoke Rapids project will not be available for many years, if ever, should this project be left undeveloped with a view to eventual construction by the United States itself, the contentions of the Secretary and of REA Association respecting the lowering of the sale price of energy to preference customers by the combining of energy from a relatively expensive project with the energy from a relatively inexpensive project seem too speculative in nature. The Secretary could not properly fix a sale price for Buggs Island energy, as matters stand now, under the assumption that Roanoke Rapids would be built by the United States even if there were no application for non-Federal construction pending. Even if non-Federal interests did not undertake the construction of any of the elements of the overall plan, it might be as long as ten or fifteen years before Roanoke Rapids would be built. Thus, there would be no government, inexpensive energy from Roanoke Rapids to be combined with Buggs Island energy for probably as long as 10 years. In the meantime, a marked increase in construction costs might well make Roanoke Rapids energy more expensive than Buggs Island energy, from a unit-cost standpoint. Costs and benefits do not always change proportionately. Further, Buggs Island and Roanoke Rapids would belong to different construction periods.

[5476] This contention of REA Association obviously has no relationship whatever to the actual needs of the preference customers in the area for energy. Liberal estimates of the load requirements of the cooperatives and municipalities within a liberally determined economical transmission distance of the Buggs Island-Roanoke Rapids area, with or without the steam support for which funds have been made available by the Rural Electrification Administration, do not show that these cooperatives and municipalties can utilize the entire energy output of even the Buggs Island project for many years to come. Thus it seems clear that if VEPCO builds Roanoke Rapids, the preference customers in the area will not be deprived of any energy that they need or actually could use within the early or foreseeable future. Neither will they, within such period, be deprived by such event of any price advantage feasible to be gained from combining Buggs Island energy with government Roanoke Rapids energy.

It may be that some day Congress will undertake the authorization of construction of purely hydroelectric projects for the sole or special purpose of supplying preference customers with low-cost energy or to provide them low-cost sources of energy to be combined with other government power to achieve the same result. But, as matters now stand, any recommendation to Congress under Section 7 (b) must be submitted in view of *existing* law and *established* Congressional policy, against the background and in the interest of [5477] the public *at large*, in which of course preference customers are included along with all other consumers.

The fact that the cooperatives in the area desire to become independent of any need to purchase energy from the Applicant company, the facts arising from the evidence in the record relative to reasonable and practicable transmission distances, as well as the facts and estimates of the future load requirements of the preference customers, lack determinative force standing beside the probability of no action by Congress looking to the construction or even the beginning of construction of the Roanoke Rapids project within any early period of time.

It is not felt that there is any good reason or ground for believing that the interests of the public at large would not

be fully protected by the Commission's exercising its jurisdiction and issuing a license under the Federal Power Act. The existence of such ground cannot be assumed without flouting and derogating the judgment of the Congress which enacted the Federal Power Act, legislation designed to promote hydroelectric development under license the terms of which are intended to safeguard the public interest and the welfare of consumers and investors as well.

[5478] Whether one agrees in all respects with the policy of a statute or not, no one—especially no public officer—can escape the duty of faithful obedience.

It does not appear that in the circumstances, the water resources at the Roanoke Rapids site should be made the subject of a recommendation to Congress under Section 7 (b) for development by the United States and it is concluded that the Commission's jurisdiction to issue a license for this proposed development by the Applicant herein, should, on the record, be exercised. If the Federal Government were poised, ready to commence at once construction of all elements of the Roanoke River plan, the effect upon the benefit-to-cost ratio of the entire plan by the extraction of one of the sites—Roanoke Rapids—would be a matter entitled to much weight. However, the benefit-to-cost ratios for the plan as a whole as well as for the individual elements are constantly changing and shifting. We have seen how the Department of the Army has been willing to revise its recommendations as to the proper order for development, and how its spokesman has estimated that even if the entire construction program were authorized to be carried to completion, such completion might require fifteen to twenty years at best. The hearings before the Committee on Public Works contain a [5479] statement by a Department of the Army spokesman (Col. Wayne S. Moore), when inquiry was made into benefit-to-cost ratios on the Savannah River Basin projects, to the effect that the Army engineers have made mistakes "in potential estimates about what might be in the future." [15]

[15] See p. 139, Hearings on the Rivers and Harbors Act of 1949 (H. R. 5472, Title I) before the House Committee on Public Works (81st Cong., 1st Sess.).

It is easy to see that these benefit-to-cost ratios, estimated five years ago, may not be the same at all fifteen to twenty years hence. It is necessary to view this question in the light of the present and the immediate future. Without assurance that the needed additional energy from Roanoke Rapids would within any early foreseeable time be supplied by Federal construction, any benefit-to-cost calculation would be purely speculative in nature.

Consideration of the physical qualities of the Roanoke River, the size of its drainage area, its average rate of discharge, its relative importance with respect to other rivers in the United States, including a consideration of the economic relationship of the basin to the economy of the whole nation, indicates no unique characteristics, from a national standpoint, which should cause this river to be set apart as being a problem of such vital importance as to require Federal development of all of its power resources. The flood problem of the Roanoke is a national problem, of course, but this is well on its way to solution. There has been no indication that the requirements of national defense or national security require the particular attention of the United States in regard to the development of projects on this [5480] river with respect to the hydroelectric features. The priority of the single-purpose Roanoke Rapids hydroelectric power project would seem to be relatively low in comparison with many other projects throughout the nation which have multiple-purpose features, including primary considerations of flood control, irrigation, and navigation. Congress has a backlog of more inviting investments for public funds, including projects which have been authorized definitely, but for which appropriations have not been made. Early authorization by Congress and construction by the United States of the Roanoke Rapids project is not indicated. In the interest of the public at large, and in the interest that smaller segment of the public which can be expected to benefit directly from the energy to come soon from Roanoke Rapids if its construction is provided for at once, there is no good reason to delay indefinitely the construction of this project to the end that the work might possibly at some future time be undertaken by the United States.

Adaptability to a comprehensive plan under Section 10 (a)

The third principal issue for determination is whether this application meets the tests set forth in Section 10 (a) of the Act and the applicable regulations thereunder, as heretofore interpreted and applied by the Commission.

Compliance with Section 10 (a) is always a matter initially for investigation by the Commission's staff and particularly the technical experts on the staff. Careful study and investigation of each application is pursued following its receipt, before any recommendation [5481] as to its disposition is submitted to the Commission for its judgment. The scores of applications (the greater number of which are uncontested) and kindred matters processed annually have given this organization of experts of the staff invaluable experience.

The factual and opinion testimony of these men respecting technical matters is entitled to considerable weight. It is the duty of these staff men to be impartial and to consider these questions objectively with obedience to law and protection of the true public interest as the paramount considerations. One representative of the licensed projects division of the staff, two representatives of the electrical resources and requirements division, and the chief of the bureau of power, which includes the two divisions mentioned, testified at length in the hearing on the technical and economic aspects of this matter, in support of their opinion, based upon technical engineering and economic considerations that the Applicant has presented adequate data accompanying satisfactory plans and that this application meets the standards set up by the law and by the Commission under the law, as guides for its judgment, and which have been followed through the years.

In addition to its own engineers and engineers of Stone and Webster Engineering Corporation, the Applicant presented as a witness a leading member of the firm of Charles T. Main, Inc., an engineering firm of unquestioned standing and long experience, which had designed portions of the Government's Buggs Island project and which had made an independent study of the engineering phases involved and the feasibility of the Roanoke Rapids plan from an engineering standpoint. The size of this proposed investment would make errors of judgment costly.

[5482] Upon these aspects of the proceeding, the Secretary put on as witnesses, Mr. George W. Hamilton, a very able and nationally recognized electrical engineer as well as Mr. Edward P. Eardley, Chief Engineer of the Interior Department's Division of Power, and another able engineer of the Interior's staff.

The plan for development of Roanoke Rapids, as submitted in the original application, was questioned by the Commission's engineering staff following its initial routine study. Conferences between the engineers of the Applicant and of the staff which ensued, resulted in the filing of the amendment to the application. In view of the Commission's engineering staff, the original plans did not provide the fullest feasible development of the site. The plan as revised as a result of these conferences, in the opinion of the staff, represents a scheme for complete development of the water resources involved. Conferences of the type held prior to the hearing in this case between the staff and an Applicant on technical engineering matters seem to be the rule rather than the exception.

There is nothing wrong in that, and no merit is found in suggestions advanced that in some way there has been improper collaboration between the Staff and the Applicant. The position of the Staff taken after full investigation was made known to all in the open hearing. There is nothing found in the record to show any violation of propriety or the rules of fair trial.

If, in fact, as the record shows, the Staff, after conference and full study of the facts, recognizing as the paramount considerations [5483] the requirements of law and the public interest, reached the conclusion that the license applied for should be issued, then it was its duty to support, as it did in the hearing, the application here pending.

The Staff's advising with the Applicant, (within commonsense limits) as to the amendation of the application necessary to meet the requirements of law and the public interest, as viewed by the Staff, was not, it is believed, subject to just criticism.

Certainly the technical Staff does nothing more than its duty in furnishing information to Applicants impartially upon these technical requirements. The activities and the position of the

Staff were not taken in secret. Much time and labor is often saved by informal conferences of government and industry, as everyone knows. Congress in fact recognized a need for reasonable latitude by the agencies performing licensing functions—by specifically exempting initial licensing proceedings from certain requirements of the Administrative Procedure Act; and Section 10 (a) of the Federal Power Act expressly authorizes the Commission to require the modification of any project and of the plans and specifications of the project works when necessary in order to secure a plan meeting the statutory requirements. It is not to be wondered at that applicants seek information and the advice of the Staff upon the technical requirements in preparing their applications.

The technical reports and the results of the technical studies of the Staff are however, being submitted to the Commission in this matter through the medium of the public hearing, which has included [5484] through cross-examination. The technical matters of evidence involved have been subjected to close study and scrutiny along with the contentions and arguments of counsel touching them.

Certain findings and conclusions presented by the Staff with slight modifications made here by the Examiner, appear to be well supported and established by the greater weight of the evidence. These (as so changed or added to) are, as follows:

[5485] 1. Additional generating capacity is needed now and will be required in the future in the area to be served by the Roanoke Rapids project. The Applicant's system can utilize the capacity and output of the plant on the basis it proposes.

2. The plan for development proposed by the Applicant will require no Federal participation or appropriation for its successful completion.

3. Construction of the project in accordance with the plans presented in this application would produce an efficient structure regardless of whether the plans were utilized by a private company or by a Federal agency.

4. The study and investigation of the project as proposed prior to the hearing on this matter, with the additional data presented at the hearing, show that the Applicant's project as now proposed is substantially in harmony with the compre-

hensive plan for development of the whole river basin as contained in House Document No. 650. Such modifications of the general plan for development of the Roanoke Rapids site as have been proposed by the Applicant have been made necessary by reason of changed physical and economic conditions in the basin since 1944 and represent improvements over the original plan inasmuch as they provide a more complete utilization of the particular water resources at the site. The Applicant's proposed plans have been reviewed by the Corps of Engineers, Department of the Army, and the report of the Chief of Engineers contains a statement that the Applicant's plan is indicated by studies to be satisfactory for development of the water resources of this reach of the Roanoke River. There has been no suggestion made by the Chief of Engineers to the effect that the carrying out of the Applicant's plan would be either inconsistent or incompatible with the over-all basin plan contained in House Document No. 650 which was approved by Congress.

5. The Applicant has adequate financial ability to undertake and complete the project proposed in its application as amended.

6. The project proposed by the Applicant would cost approximately $27,000,000 and its annual costs would be in the neighborhood of $2,800,000. The annual value of the project's capacity and energy would range between $325,000 and $400,000 over and above annual costs, exclusive of such headwater benefits payments which will be required under the provisions of Section 10 (f) for such usable additional energy output as is fairly attributable to Federal improvements upstream from the project.

[5486] 7. The amount of the payments for headwater benefits cannot be estimated with any degree of accuracy until after the project has been placed in operation for such time as necessary to demonstrate what actual benefits are being conferred. There has been no evidence adduced which can be accepted as establishing at this stage when the project does not yet exist, that payments for the headwater benefits to be conferred would be of such magnitude as to render the project economically infeasible for private development.

8. The proposed project would be feasible from an economic standpoint even if no upstream improvements were constructed and operated by the United States. Storage regulation which will be provided by the Buggs Island Reservoir will increase the energy output of the Roanoke Rapids project, but not the capacity.

9. No application for preliminary permit or license for a project at the same site covered by the amended application for Project No. 2009, or in conflict with the project proposed in the amended application for Project No. 2009, is before the Commission.

10. Construction of the proposed project by the Applicant would improve the reliability of power supply in the area by providing generating capacity locally, would make the area less subject to interruptions or disturbances caused by transmission line outages and would improve to some extent the voltage regulation on the Applicant's power system in that area. The Applicant's power supply is now nearly all from steam-electric generating plants, which, by 1951, will have a dependable capacity of 704,300 kilowatts, plus approximately 10,000 kilowatts of dependable capacity (under adverse river conditions) from its existing hydroelectric plants. The dependable capacity of a small hydroelectric plant of the Applicant at Roanoke Rapids and now in existence, would be increased from 3,000 kilowatts to 5,000 kilowatts by construction of the proposed project so that the total dependable capacity at Roanoke Rapids would become 96,000 kilowatts. This additional capacity will be required and can be absorbed by the Applicant's system by 1953 or 1954, plus other additional capacity of some 220,000 kilowatts from additions to existing steam-electric plants.

11. The project proposed is best adapted to the Congressionally approved comprehensive plan for improving and developing the waterway [5487] involved, for the use and benefit of interstate commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.

In consideration of the evidence and the record, the foregoing findings and conclusions are here made by the Examiner.

It has been necessary upon the evidence to reject contrary contentions after careful consideration. One of such contentions is that under natural, unregulated stream-flow conditions, i. e., without Buggs Island regulation and storage, the proposal of the Applicant would be economically infeasible. Capacity is not enough, it is urged.

The evidence in support of the rejected contention is not, on the whole, convincing, but in any event there would be little force in such a contention even if proved. We are concerned now with facts and conditions as they are, and it appears reasonably certain that the installation of Buggs Island project upstream from Roanoke Rapids will be completed soon. It is not required that an applicant shall establish economic feasibility of a proposed project under improbable hypothetical conditions or in a situation which the record shows will not exist.

Equally lacking in merit is the contention that the initiation and completion of the Roanoke Rapids project by the Applicant without a contract with the Secretary of the Interior relative to the storage and release of Buggs Island water involves an unwarranted risk of capital. In any event we cannot deny that private capital appears willing to take the risk, and the judgment of an experienced and successful utility company, [5488] willing to risk its money in the investment is entitled to weight. Nor can it properly or fairly be assumed that the Buggs Island reservoir will be operated so as to create flow conditions at Roanoke Rapids of such a character as to impair the value of the Roanoke Rapids plant. Rather it should be assumed and can be expected that there will be friendly cooperation in the public interest between the government operating Buggs Island and private investors operating Roanoke Rapids.

There is strong engineering evidence that operation of the Buggs Island project will have to assume a pattern and that the storage and release of water from Buggs Island will be necessarily closely related to the loads of the prospective purchasers of this energy. The load requirements of many of the preference customers are known since most of them are now being served by the Applicant's system. The engineers of the

Staff and of the Applicant, it appears, have proceeded on the assumption that Buggs Island storage will be operated as efficiently and economically as possible and in accord with sound engineering practice and with appropriate cooperation and coordination by Federal and private developers for the common good. This assumption seems valid and reasonable. A contract in these circumstances is not indispensable in advance of or as a condition to the granting of license.

It is not overlooked that it has been contended that the benefits to be conferred upon Roanoke Rapids by Buggs Island storage would be so considerable that, if payment should be required in an [5489] amount comparable to the actual benefits to be received, the Roanoke Rapids plant would be economically unsound as an independent development, and would be less desirable from the Applicant's standpoint on a dollar-investment basis than would be the capacity which could be made available from a steam-electric plant. The evidence in support of this contention is not strong and is not at all convincing. It is necessarily based upon many unknown factors, among those being the actual character and amount of benefits to be conferred, and the future prices of fuel. The amount of fair and just headwater benefits charges cannot be determined now. The economic feasibility of this project must be determined upon the assumption that the headwater benefit charges will be reasonably and equitably fixed. It is not believed that the record shows or establishes that reasonable and fair headwater benefit charges would be in an amount sufficient to render this otherwise feasible project economically infeasible.

Applicant's existing Roanoke Rapids project

During the hearing in this proceeding (Proj. 2009) it was disclosed that the Applicant owns, operates and maintains an existing project very near to the site of the project proposed in its application. This existing project consists of a low diversion dam across the Roanoke River in the vicinity of the dam proposed in Project No. 2009, a power canal approximately a mile and one-half long, intake works, and a power station located at the Roanoke Rapids highway bridge, with an installed capacity of 6020 kw. Some sort of development has been in

existence at this site since 1908, either owned by [5490] Virginia Electric and Power Company, or one of its predecessors. This project is now operating without a license from this Commission, and there is no application for license for it now pending. The Corps of Engineers' report, to which frequent reference has been made (House Document No. 650) does not suggest that there is any kind of Federal authority for the existing dam.

It is in evidence without challenge that the capacity and output of the existing unlicensed installation would be increased by reason of the new Project No. 2009, and the Applicant's witnesses have stated that the existing unlicensed project will be a beneficiary of the Federal reservoir at Buggs Island as well. The Applicant, it appears, not only concedes that the Commission has jurisdiction to license Project No. 2009—but it, in fact, urges vigorously that this authority be exercised. It has not, however, submitted an application for license for its existing project.

It is thought that issuance of license in this proceeding should, in view of the evidence, be coupled with provision for license for, or enquiry in respect of, the existing unlicensed hydroelectric project owned and operated by the Applicant on the same river in the same locality.

In the order in this proceeding there will be included a requirement (subject of course to Commission review on its own motion or on appeal from the Examiner's decision along with the other parts of such order) that either an application for the existing Roanoke Rapids project be filed in accordance with the Commission's General [5491] Rules, or that good cause be shown by the Applicant, Virginia Electric and Power Company, why such application should not be required to be filed under the terms of the Federal Power Act. An application should be filed or good cause for not filing shown, within 60 days following the effective date of this decision.

Ultimate conclusion

In view of the entire record, it is concluded that the pending application, as amended, of Virginia Electric and Power Company should be granted and a license issued to the Applicant

authorizing it to proceed at once with the construction and operation of the proposed hydroelectric power project on the Roanoke River near Roanoke Rapids, North Carolina, subject to the special conditions provided in the order which next follows.

[5492] ORDER AUTHORIZING ISSUANCE OF LICENSE (MAJOR) AND GRANTING PETITION TO INTERVENE

On October 6, 1948, Virginia Electric and Power Company of Richmond, Virginia, filed an application under the Federal Power Act for the construction, operation and maintenance of a proposed major hydroelectric development (Project No. 2009) on the Roanoke River in Halifax and Northampton Counties, North Carolina, near Roanoke Rapids, North Carolina.

By direction of Congress, the Roanoke River Basin was made the subject of study by the Chief of Engineers of the Department of the Army and the results of that study, including a general plan for development of 11 sites on the main stream and tributaries, including the Roanoke Rapids site, were submitted to Congress (House Doc. No. 650, 78th Cong., 2nd Sess.). This general plan for comprehensive development of the Roanoke River Basin was approved by Congress in the Flood Control Act of 1944 (58 Stat. 887). Congress in that Act also authorized and appropriated funds for the development of the Roanoke River Basin for flood control and other purposes at two sites (Buggs Island and Philpott) upstream from the site proposed for development by the Applicant herein, and such construction of the facilities at the Buggs Island and Philpott sites has been commenced by the United States.

After conferences with the technical staff of the Commission, the Applicant on April 6, 1949, filed an amendment to its application for license for the purpose of providing a project that would be best adapted to the comprehensive plan approved by the Congress for development of the water resources of the Roanoke River at the proposed site.

A description of the project, data respecting the public hearing on the application, the status of each of the parties involved in the hearing and an outline of the procedural events

leading to such status, the nature and form of the opposition to the application, together with the principal contentions of the parties, as relied upon for the purposes of this order, are set forth in the text of this decision preceding this order, and need not be repeated here.

The Assistant Secretary of the Interior acting for the Secretary of the Interior under the provisions of the Federal Power Act has recommended certain provisions relative to protection of fishlife.

The Chief of Engineers has approved the Applicant's plans for the project with certain license conditions which are hereinafter provided.

The Presiding Examiner, in addition to the findings contained in the preceding text of this initial decision, finds:

[5193] (1) The Roanoke River is a navigable water of the United States, as defined in Section 3 (8) of the Federal Power Act, at and above the sites of the project proposed in the application and the applicant's existing Roanoke Rapids development.

(2) No public lands or reservations of the United States are included in or affected by the project proposed in the application.

(3) The Applicant is a corporation organized and existing by virtue of the laws of Virginia and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the proposed project.

(4) The Applicant has submitted satisfactory evidence of its ability to finance and carry to completion the project described in its application as amended.

(5) Public notice of the application and the amendment thereto has been given as required by the Federal Power Act.

(6) The grounds presented by the Secretary of the Interior for participation as an intervener in the proceeding are adequate under the General Rules of the Commission, and such participation as an intervener in the Commission's proceeding well may be in the public interest.

(7) The Federal Power Commission is vested by virtue of the provisions of the Federal Power Act with jurisdiction to

entertain and to grant an application by a citizen of the United States, an association of such citizens, a corporation organized under the laws of the United States or any State thereof, or any State or municipality for the purpose of constructing, operating, and maintaining a dam, reservoir, power house, transmission line or any other project works necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power across, along, from or in the Roanoke River in North Carolina at and near the town of Roanoke Rapids, North Carolina, and there has been no legislation by Congress which amends the Federal Power Act in this regard or withdraws the Roanoke Rapids site from the licensing jurisdiction of the Commission. Federal construction of the Roanoke Rapids unit of the Congressionally-approved comprehensive plan has not been authorized.

[5494] (8) The concurrence by the Federal Power Commission in the recommendations of the Corps of Engineers contained in House Document No. 650, did not constitute a finding or recommendation submitted to Congress under the provisions of Section 7 (b).

(9) The record in this proceeding does not provide a proper or sufficient basis for judgment or a finding under Section 7 (b) of the Act that development of the water resources at Roanoke Rapids should be undertaken by the United States itself or for the submission of such findings and a recommendation to Congress to such effect, as provided in such section.

(10) The general plan for development of the Roanoke River Basin as set forth in House Document No. 650, 78th Congress, 2nd Session, and approved by Congress in the Flood Control Act of 1944 (58 Stat. 887) constitutes the comprehensive plan for improving and developing the Roanoke River for the use and benefit of interstate commerce, and for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; the project proposed is in harmony with the approved comprehensive plan and is "best adapted to a comprehensive plan" as that language is used in Section 10 (a) of the Federal Power Act.

(11) For the purpose of determining annual charges, the installed horsepower capacity of the project is 125,000 horsepower.

(12) The amount of annual charges to be paid under the license for the project for the purpose of reimbursing the United States for the costs of administration of Part I of the Act are reasonable as hereinafter fixed and specified.

(13) The following designated maps, plans, and specifications, filed as part of the application, conform to the Commission's rules and regulations and, subject to the condition hereinafter specified in paragraph (x), should be approved as parts of the license:

Exhibit J (revised), FPC No. 2009–1.

Exhibit L (in 2 sheets), FPC No. 2009–4, 2009–5.

Exhibit M (revised).

(14) Exhibit K has not been submitted and should be submitted within one year of the date of issuance of the license.

The releases needed to maintain these tabulated flows shall be supplemented as necessary to provide a minimum rate of flow of 2,000 second-feet from April 1 to June 1 of each year, except as this period may be modified upon the advice of the North Carolina Wildlife Resources Commission. Modification of the period during which basic minimum flows are augmented to the 2,000 second-foot level in accommodation to annual variations in the time and duration of spawning activities of the striped bass, and in accordance with the recommendations of the North Carolina Wildlife Resources Commission, shall be limited as follows: the date of inauguration of the supplemental spawning-period flows shall not be advanced beyond March 15, nor retarded beyond April 15; the date of conclusion of the augmented spawning-period flows shall not be advanced beyond May 15, nor retarded beyond June 15; and the duration of the period of these spawning-period flows shall not exceed 75 days in any one year.

(iii) The volume of controllable releases of water from the project reservoir shall not be permitted to increase to double, or to decrease to half, of any prevailing discharge in less than one hour during the spawning period of striped bass. The spawning period shall be the period from April 1 to June 1 of

each year, except as modified upon the recommendations of the North Carolina Wildlife Resources Commission as provided under recommendation (ii) above.

[5497] (iv) The entire project area, except for such portions as may be reserved for reasons of safety and efficient operation, shall be open to free use by the public for the purposes of fishing, hunting, and other recreational pursuits.

(v) Practical means of reducing the losses to fish and wildlife occasioned by the construction and operation of the project, of increasing the biological productivity of the project area, and of furthering its public use for recreational enjoyment, shall be devised and developed by the licensee in cooperation with the North Carolina Wildlife Resources Commission and the United States Fish and Wildlife Service.

(vi) Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the said project, the Licensee shall convey to the United States, free of cost, such of its lands and its rights-of-way and such right of passage through its dam or other structures and permit such control of pools as may be required to complete, maintain, and operate such navigation facilities.

(vii) The Licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the Licensee or by the United States.

(viii) The operation of any navigation facilities which may be constructed as a part or in connection with any dam or diversion structure built under the provisions of this license shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army. Such rules and regulations may include the maintenance and operation by the licensee at its own expense of such lights and signals as may be directed by the Secretary of the Army.

Annual interval	Minimum rate of flow week day	Second-feet, week end
January to April, inclusive	500	500
May	1,250	600
June to August, inclusive	2,000	1,000
September	1,600	800
October	1,250	600
November and December	500	500

[5495] Wherefore, it is ordered, subject to review by the Commission on appeal or on its own motion, as provided in its Rules of Practice and Procedure, that:

(A) The Secretary of the Interior be and he hereby is permitted to become an intervener in this proceeding; *Provided*, That such status as intervener shall relate back to and be effective as of May 12, 1949, the opening date of the hearing on this matter, and that the participation of the intervener in the proceeding since that date shall be considered as limited to matters affecting asserted rights and interests specifically set forth in his petition for leave to intervene, filed on April 25, 1949, and *provided further*, That the admission of such intervener shall not be construed as recognition that he might be aggrieved because of any order or orders entered in this proceeding.

(B) Virginia Electric and Power Company file an application under the Federal Power Act and the Commission's General Rules, for license covering its existing hydroelectric installation at Roanoke Rapids, North Carolina, within 60 days of the effective date of this decision or, in the alternative, show good cause within the same period why a license under the provisions of the Federal Power Act, effective as of January 1, 1938, is not required for the continued operation of this project.

(C) A major license be issued to the Virginia Electric and Power Company under Section 4 (e) of the Act for a period of 50 years effective as of the first day of the month in which the license is issued, for the construction, operation, and maintenance of the project here applied for, subject to the usual conditions and provisions of licenses for such projects, and the following special conditions:

(i) The Licensee shall construct, maintain and operate such fish protective devices and shall comply with such special conditions in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior.

(ii) Except as hereinafter provided, sufficient water shall be released from the project reservoir to maintain minimum flows in the Roanoke River, as measured at the highway bridge at Roanoke Rapids, in accordance with the following tabulation. The similar [5496] flows listed for week-end requirements are predicated upon a diminished influx of pollutanta:

[5498] (ix) The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation, and the operations of the Licensee so far as they affect the use, storage and discharge from storage of waters affected by this license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interests of navigation.

(x) The applicant shall make adequate investigations of the suitability and economic feasibility of the proposed relocated Gaston site and obtain the approval of the Commission before establishing finally the height of the Roanoke Rapids pool at Elevation 132 mean sea level.

(xi) The Licensee shall allow officers and employees of the United States free and unrestricted access in, through, and across the said project and project works in the performance of their official duties.

(xii) The Licensee shall permit the free use by the public for navigation or recreational purposes of the reservoir formed by said dam, and shall, when not inconsistent with the operation of said project, allow the construction of wharves or landings in the interest of navigation.

(xiii) The Licensee shall cut and remove or destroy, to the satisfaction of the representative of the Commission, all brush and trees from the area to be submerged so that no brush or trees extend above an elevation 12 feet below the minimum power pool.

(xiv) The Licensee will be required to operate its project in such a manner as the Chief of Engineers, Corps of Engineers, Department of the Army, or his authorized representative, may prescribe in order that the flood control and other benefits from present and future improvements under the jurisdiction of the Corps of Engineers as authorized by Congress in the Roanoke River Basin will not be nullified or substantially impaired by operation of the Licensee's project.

[5499] (xv) The Licensee shall have no claim against the United States arising from the effect on the proposed project of operation of the Buggs Island Reservoir or any intervening reservoirs that may be constructed by the United States at future dates.

(D) The Licensee shall commence the construction of the project within one year after the date of issuance of the license and shall complete construction within three years of the date of issuance of the license.

(E) After the first twenty years of operation of the project under this license, six (6) percent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings and for the establishment and maintenance of amortization reserves pursuant to Section 10 (d) of the Act; one-half of all earnings in excess of six per cent per annum shall be paid into such amortization reserves and such amortization reserves shall be established, maintained and disposed of in accordance with the terms of the Act and such rules, regulations and orders of the Commission as may be adopted pursuant thereto.

(F) Subject to the provisions of Section 10 (e) of the Act and the rules and regulations of the Commission thereunder, the Licensee shall pay to the United States an annual charge, effective as of the date of issuance of the license, for the purpose of reimbursing the United States for the costs of administration of Part I of the Act, of one (1) cent per horsepower on the authorized ultimate installed capacity in horsepower, plus two and one-half (2½) cents per 1,000 kilowatt hours of gross energy generated by the project during the calendar year for which the charge is made.

(G) The maps, plans, and specifications referred to in finding (13) above, are hereby approved as part of the license for the project, subject to the condition hereinbefore specified in paragraph (x).

(H) Exhibit K shall be submitted in accordance with the rules and regulations of the Commission, to the Commission within one year from the date of issuance of the license.

Dated this 17th day of March 1950.

FRANK A. HAMPTON,
Chief Presiding Examiner.

SUPPLEMENT TO EXAMINER'S DECISION OF MARCH 1950

[Dated November 15, 1950]

[5632] HAMPTON, *Chief Presiding Examiner:* In the further hearing held in this proceeding in June and July of this year under the Commission's order of April 27, 1950, as amended by its order of June 15, 1950, the Secretary of the Interior [1] was permitted, in his proper turn and without limitation of time, to introduce any additional relevant and material evidence he desired to offer and was not confined to newly discovered evidence or evidence which with reasonable diligence could not have been offered in the hearing held last year. Equal opportunity was of course given to all parties, in their proper order, to present further evidence.

Interior's additional evidence, as well as the additional evidence introduced by others including the Applicant, the Virginia Electric and Power Company,[2] was directed principally to the questions of (1) the economic feasibility of the Applicant's proposed development; (2) whether or not, otherwise, the Applicant's proposed project "is best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development and for other beneficial public uses, including recreational purposes"; [3] and (3) whether or not the development of the project at the Roanoke Rapids site "for public purposes should be undertaken by [5633] the United States, itself".[4]

The March 1950 initial decision, of course, undertook to dispose of these issues, and it is necessary now only to consider the legitimate effect, if any, of the additional evidence re-

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[1] Sometimes hereinafter referred to as "The Secretary" or "Interior."
[2] Sometimes hereinafter referred to as "VEPCO" or "Applicant."
[3] Federal Power Act, Sec. 10 (a).
[4] Federal Power Act, Sec. 7 (b).

ceived at the further hearing, upon (1) the issues and (2) the findings and determinations made in that decision. Because of the extraordinarily liberal bounds within which additional evidence was received at the further hearing, it has been necessary, of course, to reexamine also almost all the evidence received at the 1949 hearing as well as the findings and conclusions thereupon, heretofore reached and stated.

Although the question was reargued by counsel for Interior in his brief, no additional evidence was introduced upon the primary jurisdictional question of whether the Congress has reserved the Roanoke Rapids site for development by the United States and thus whether or not the Commission has jurisdiction to entertain the pending application of Virginia Electric and Power Company. Nor was any additional evidence presented on the question of the Commission's jurisdiction to determine, now, the question posed by Section 7 (b) of the Federal Power Act, and (in the event it should be determined that the evidence does not show that the Applicant's proposed development is one that should be undertaken by the United States, itself), then to consider and act upon the merits of the application under the further tests prescribed by the statute. The matters touching [5634] jurisdiction cited and argued by Interior's counsel in the brief recently filed were considered, so far as they were material, in connection with the initial decision of March 1950. These matters have now been examined again, but no good reason or ground is perceived for changing the findings or decision upon the jurisdictional questions. It may be added here that Section 10 (f) of the Federal Power Act obviously contemplates the licensing of power projects downstream from storage reservoirs or headwater improvements constructed by the United States[5] as do also Sec-

[5] Section 10 (f), in part, provides: "That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of *the United States* of a storage reservoir or other headwater improvement, the Commission *shall require as a condition of the license* that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission [Federal Power Commission] may deem equitable." [Emphasis and matter in brackets supplied.]

tions 4 (e) and 3 (8) when considered together. Section 4 (e) clothes the Commission with authority to issue licenses for projects in streams "or other bodies of water" over which the Congress has jurisdiction under its authority to regulate interstate and foreign commerce. These of course embrace navigable waters of the United States. Section 3 (8) defines "Navigable Waters" and states what they include. Among them are "such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

[5635]. Little, if anything, in the way of basic facts, was added to the record by the hearing held this year. Relatively few, if any, material, basic facts are in dispute in the case. There is no controversy with reference to such facts as the Applicant's past loads and requirements, the characteristics of the Roanoke River and its recorded flows, the recommendation of the Army Engineers with respect to the development of the basin, the status of existing navigation and the character and amount of past navigation in the various reaches of the river, etc., etc. The matters in dispute are, in the main, in respect of the conclusions to be reached upon the basic facts plus the evidence given by expert witnesses and the proper application of the law to such conclusions. Much of the evidence given by the engineers necessarily consists of judgment opinions, estimates and forecasts for the future, containing inevitably, elements of uncertainty, although supported by informed judgment based upon study, experience and a knowledge of the pertinent facts of the present and past. The best that can be done with conflicting evidence of this character, is to accept the views which are judged to be the most reasonable and best supported by the facts in evidence as well as the intent and purpose of the Congress in the formulation and enactment of the statutes under which the proceeding has been heard and must be decided. Appropriate consideration must of course be given to the fact (where, as here, it is a fact) that plural groups of engineers, each of them making its own independent investigation and study, reach substantially

similar conclusions while another group stands alone in reaching different conclusions. [5636] Under the law, it is the judgment of the administrative body, guided and ripened by its sense of public duty and its special knowledge, study, experience and resultant expertise, which must, in the light of the evidence and the intent of the law-making body, consider and reach conclusions from such evidence and decide the issues to which it is addressed.

Counsel for the Secretary contended again in the reopened hearing that the natural flows of the Roanoke River would not be of sufficient magnitude and duration to produce the 91,000 kw. of dependable capacity assigned to the proposed Roanoke Rapids plant by the Applicant, and that the Applicant has underestimated the extent of the headwater benefits which will be conferred upon the proposed new plant. It was contended further that payments for such headwater benefits arising from improvement of the flow of the river by the upstream Army project, will necessarily be in an amount which will render the proposed project economically infeasible. These contentions are based upon a conclusion as to the character of the benefit to be conferred, and because that conclusion as will be shown, is based upon an engineering assumption which is quite wrong, Interior's studies which have been prepared upon such assumption must fail of their purpose. The evidence introduced by the Applicant and the Staff, if is thought, well establishes that the Applicant's proposed project (1) would be fully dependable to 91,000 kw. capacity on the anticipated VEPCO load if required to operate under the most adverse conditions ever to be expected, based upon the water supply records of past years, and (2) would be economically [5637] feasible. The hydraulic study which supports these conclusions was apparently undertaken with recognition that "natural flow" of the Roanoke is a thing of the past, since the Buggs Island reservoir project will regulate the major part of the flow. This study shows that Applicant's proposed project will be fully dependable upon the flows as regulated and improved by the Buggs Island reservoir project, so long as these regulated flows, on a weekly basis (during the period of highest peak demand on the Applicant's system) are not less in amount than

the quantity of water which would have been available for use by the Roanoke Rapids project had there been no construction of a dam and storage reservoir at Buggs Island by the Government.

It is noted that Interior urges (supported by Witness Hamilton's expressed opinion) that it is probable that the navigation project on the Roanoke River adopted by the Congress in 1871, which calls for a 5-foot channel in its upper portion (Palmyra-Weldon) will be reactivated within a foreseeable time and that the Applicant will then be faced with a requirement for the continuous release of a minimum of at least 2,500 c. f. s. for the authorized channel depth. We have no factual evidence here, establishing that this navigation project will be reactivated or even the probability of its reactivation. It appears that if at any future time 5-foot navigation in the Palmyra-Weldon section should be desired, the 2,500 c. f. s. of flow will necessarily be obtained from upstream storage, there being extensive periods each year when the river's natural flow is much less than 2,500 c. f. s. The proposed Roanoke Rapids project is practically a run-of-river [5638] plant. It has been shown to be capable of passing the 2,500 c. f. s. (from upstream storage) continuously under the expected regulated flow conditions and its dependable capacity on the VEPCO system load, it appears, would be unaffected by a requirement to pass a continuous flow of 2,500 c. f. s. And further, if in fact there should ever be such a required continuous release, the proposed project, under the anticipated regulated flow conditions, could serve as a reregulator, passing the 2,500 c. f. s. continuously while at the same time performing its planned function as a peak load plant. It could thus even be of benefit to the Buggs Island plant, which in that event could function free of the 2,500 c. f. s. continuous flow release requirement, thereby attaining greater flexibility of operation, especially when its ultimate capacity shall have been installed.

Other than for a reference to the 1871 statute of Congress authorizing a 5-foot navigation channel to Weldon and the expression of opinion by Witness Hamilton, the record is devoid of any evidence of substance which would indicate or suggest that a requirement of a fixed navigation release need

be expected by any power project on the Roanoke River. No such suggestion has been advanced by the Army in its official report on this project under Section 4 (e) and, further, the Army has not even asked that regulations governing the rate of discharge for the Applicant's plant be set forth in the license, although it appears certain that the proposed operation of the Applicant's project as a peaking plant will cause wide variations in stage [5639] as far downstream as the present head of navigation, Palmyra. The most practicable solution of the problem of future navigation above Palmyra, if such problem should ever present itself, would seem to lie in the Army's plan for at least one slack-water dam equipped with a lock, to be located midway between Palmyra and Weldon, which would create a pool suitable for navigation use between Weldon and Mile 114. Such a dam could be used to reregulate varying discharges from the power projects upstream, to provide navigable depth from Palmyra to the slack-water dam. By balancing the different uses to be made of the waters of the Roanoke in this way, the river could be used for more extensive navigation if it should become desirable, as well as for the production of needed electric capacity and energy.[6]

The gist of Interior's contention on the question of whether or not the Commission should find under Section 7 (b) that the Roanoke Rapids project should be undertaken by the United States itself, is contained in one of the findings requested, to wit:

> (19) The construction of Roanoke Rapids by the Applicant would materially and adversely affect the marketing of Buggs Island power by the Secretary of the Interior, in accordance with the requirements of the law, and in accordance with the policy by him adopted, in that such power would not be available to meet the requirements of the preference customers, and in that the power would have to be disposed of to the preferred customers at higher rates.

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[6] Hereinafter, for convenience, the single word "power" will be used to mean both capacity and energy. "Capacity" or "Energy" will of course be used as the fact may be, when either is referred to separately.

[5640] The contention that without Roanoke Rapids power to be combined with Buggs Island power the latter would have to be sold to preferred customers at higher rates is highly speculative and unrealistic. This contention was properly and adequately disposed of by the March 1950 decision (p. 60), and no evidence or sound reasoning has been presented since which could legitimately affect the basis of the conclusion and disposition there made, except to strengthen it. It is not deemed necessary to discuss the question further.

The allegation that if Roanoke Rapids is licensed to the Applicant its power output "would not be available to meet the requirements of the preference customers," is immaterial and beside the point, for the reason that the record is without evidence sufficient to establish or show that preference customers need Roanoke Rapids power or will need it at any early or foreseeable time. Besides, the Congress, which controls the matter, has not authorized Roanoke Rapids for Federal construction, and therefore, has not indicated any intention to place Roanoke Rapids power in the hands of Interior to sell.

The foregoing requested finding (19) and other related findings requested by Counsel for Interior, are, it is assumed, based upon his interpretation of the scope and effect of Section 5 of the Flood Control Act of 1944, which section, the record shows, constitutes the Secretary's only authority in the premises.[7] This section is as follows:

> [5641] SEC. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the

[7] Administrator Creim of the SEPA, in his testimony, referred to Section 5 as "my very simple charter for my operations as Administrator of Southeastern."

Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

It should be mentioned here that there has not been any question or doubt expressed in this proceeding that all of the surplus power from the initial installation at Buggs Island will be marketable as soon as it is available and to customers to whom under Section 5, the Secretary is authorized to sell and deliver it. Indeed, the Applicant has expressed a desire to purchase all or as much of the Buggs Island as can be sold to it.[8] It is probable that all of the surplus power to be produced could be sold and delivered, with [5642] advantage to the Government and to consumers, at or near the bus bar. Exhibit 21, which was not challenged, shows that the high voltage transmission lines of at least two major utility systems are so close to the Buggs Island project that power from that project could be taken by them without installation of additional transmission facilities. This manner of disposal with a reasonable and satisfactory "wheeling" arrangement to assist in supplying preference customers' needs, would probably render

[8] Testimony of Mr. Holtzclaw, President of the Applicant Company.

unnecessary a Congressional appropriation which would have to be obtained before transmission facilities could lawfully be built or acquired under the Flood Control Act of 1944.

The provision of Section 5 of that Act that "preference in the sale of such (here, Buggs Island) power and energy shall be given to public bodies and cooperatives," clearly appears to mean that when a quantity of surplus Buggs Island power is available for sale, and there are public bodies and cooperatives in a position to purchase and who offer to purchase any or all of this available power, such applicants shall have first call over others, provided their proposed purchase contracts meet the standards set in Section 5. These standards, by the words of the statute, must be met by *all* purchasers, preference customers and others alike. We must consider the language of Section 5 as it is, regardless of any opinion as to whether or not its scope and effect should have been made broader or narrower. Applied to the instant case, Section 5 serves to authorize the Secretary of the Interior to sell and deliver to certain classes of [5643] customers named in the Section such surplus power as may be produced at the Buggs Island Government project; to give preference to certain of those classes in disposing of such surplus power; and, if necessary in order to dispose of it on terms that will meet production and transmission costs and recover the Government's investment, to seek appropriation of public funds to build or acquire essential transmission lines. However, Interior Counsel's interpretation of the authority given the Secretary, as indicated by the evidence offered in the 1950 further hearing, seems to go much further and to consider that the Secretary's duty and authority under the Flood Control Act of 1944 are not merely to sell and deliver the surplus power and to give public bodies and cooperatives preference over privately owned companies when both are attempting to purchase surplus power from Government projects, but also that the Secretary must provide and deliver *all* the power that preference customers within transmission distance may require now or in the future, provide also new sources of power to meet prognosticated future demands of expected preference customers and, even further, to arrange for future preference loads to create additional

demands. But we are not able to find in Section 5 of the Flood Control Act of 1944 words sufficient to confer such authority. However desirable such a provision might be thought to be, the Congress has not charged the Secretary of the Interior with the duty or authority to meet and satisfy all present and future demands of preference customers. Neither is the authority given him to provide new Federal projects [5644] for such purpose.

The reports of the Committees of Congress upon the Flood Control Bill which became the Flood Control Act of 1944, as well as the Congressional debates upon the Bill, make it clear that it was not the legislative intent to confer upon Interior any power or duty to affect or influence the construction of the projects in the Army's Comprehensive Plan. Representative Whittington, Chairman of the House Committee on Flood Control, explained in the debate [9] that Interior, under the Bill (now the Act) "has no authority whatever with respect to the construction." He also stated, "We have said that the matter of power is to be passed on by the Chief of Engineers and by the Federal Power Commission * * * I may say in reply to the gentleman's question that the Secretary of the Interior has no control whatever over the construction of any dam under the control of the War Department." At another point in the debate, Mr. Whittington repeated, with reference to the Secretary of the Interior: "He has no power whatever with respect to building and construction, and his power is limited only to the sale and transmission of the excess power generated at dams authorized and constructed by the War Department." The report of the Senate Committee upon the Bill contains the following:

> The committee desires an amendment which provides a convenient and practical method of disposing of power at projects under the control of the War Department without setting up a public power trust which would be unduly competitive with established private power [5645] utilities. The committee, therefore, has inserted a proviso [now Section 5 of the Act] which authorizes the Secretary of the Interior to construct

[9] Congressional Record, December 12, 1944, p. 9287.

> and acquire only such transmission lines or related facilities as may be necessary in order to make the power and energy generated at such projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives and privately owned companies. The committee recognizes the desirability of granting preferences in the sale of such power and energy to public bodies and cooperatives when the power is generated at projects financed by the Federal Government.[10] [Matter in brackets, supplied.]

Chairman Whittington of the House Committee stated further, in the House debate: [11]

> Many projects have been proposed under the guise of public works, but every proposal should be studied and tested. They should meet the requirements of sound public works. First, the project should have practical utility. Second, it should be economically sound. Third, it should be of the type that cannot compete with any facilities that can be provided through private enterprises. Federal public works should not conflict with private works and local public works * * *

It is true that Section 5 imposes upon the Secretary the duty to dispose of the surplus power "in such a manner as to encourage the most widespread use thereof at the lowest possible rates to consumers, consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission", but this, it is believed, is wholly insufficient to authorize or require Interior to arrange to satisfy all future needs of preference customers or to build or acquire transmission lines [5646] with public funds when no Government transmission lines are actually necessary to effect the sale and delivery of the surplus power to any of the approved groups according to the standards prescribed and when the demands of preference customers can

[10] Sen. Rep. No. 1030, 78th Cong., 2nd Sess. (1944).
[11] 90 Congressional Record 4122 (1944).

be supplied directly or by a satisfactory wheeling arrangement.[12]

It is interesting also to note that it is in evidence that Interior, under authority of the Flood Control Act of 1944, is even now selling all the surplus power from the Government's multiple purpose Allatoona project on the Etowah River in Alabama to a private utility company under a contract which provides for supplying the needs of preference customers.

It appears certain that Interior is not by law authorized or required to concern itself in respect of the potential output of sites not yet authorized for Federal construction on the Roanoke River. It must be and is concluded that the evidence introduced by Interior, with its forecasts, assumptions and meager and insufficient facts respecting future requirements of possible or expected preference customers for power over and above the amount ultimately to be available for sale to them at the two sites (Buggs Island and Philpott), authorized and appropriated for by the Congress for Federal construction, is not material to the question of whether or not VEPCO should be permitted, under Federal license and regulation, now to develop power from presently unutilized waterflow at Roanoke [5647] Rapids. Even though it could be established at this time that by 1960 the load of public bodies and cooperatives within economical transmission distance will have grown to such an extent as to be sufficient to absorb the surplus power of Buggs Island, Philpott and Roanoke Rapids, that fact would be immaterial here, the Congress having chosen to appropriate for, and authorize Government development of, only two of the sites embraced in the comprehensive plan and not having chosen to authorize or appropriate for Government development of the Roanoke Rapids site which would be a purely power project and not a multiple purpose project.

And, even if the words of Section 5 of the Flood Control Act of 1944 warranted a broader interpretation than is here given

[12] It is interesting to note SEPA Administrator Creim's statement on cross-examination that "The Act says specifically what the Secretary shall do" and "It authorizes the Secretary to construct transmission lines when it becomes necessary to get this power to the customers."

them, the evidence introduced on the subject of future power requirements of widely-scattered possible future preference customers would not be sufficient to establish the contention that Roanoke Rapids power is a necessity to the successful marketing, under the terms of the statute, of the power from the Buggs Island project or is necessary to supply the needs of preference customers. The testimony of the recently appointed Administrator of SEPA shows clearly that at the time he testified (and no doubt because of the very short time which had elapsed since his new office had been opened), he was just coming to grips with the problem of marketing in the area. He had made no contracts for the sale of any part of the Buggs Island power to come from the initial installation. He could not say with any certainty how many cooperatives and public bodies would want and could use any [5648] of the Buggs Island output. The "Memorandum of Understanding" with the Old Dominion Cooperative, the evidence shows, was entered into upon the understanding that the cooperative would be able to embark on its steam program and would construct its own transmission grid. This matter has not been settled so far as the record shows. The Administrator, who had opened his new office less than three months preceding his testimony here and without the assistance of a full staff, lacked information which would enable him to say how many municipalities with or without small steam or diesel generating stations would desire to become a part of the projected SEPA power grid under such contractual provisions with respect to resale rates as Interior may feel it should insist upon. The Administrator had not been furnished with usable estimates of the power requirements quantitatively, of any potential customer (other than VEPCO), and while he did have certain hastily gathered information as to the capacities involved, such information is meager and furnishes no sufficient basis for a conclusion as to the shape of the potential customers' load curves. The Administrator, himself, manifestly an able engineer, on the witness stand frankly characterized the study he and his staff had made of regional power requirements for the purpose of this proceeding, as a "quickie" study, still incomplete. The evi-

dence introduced on the subject is insufficient to show that Roanoke Rapids power, in addition to Buggs Island and Philpott surplus power, could be utilized by or is required for preference customers' loads even if we should assume that the Secretary under [5649] Section 5 is required to undertake to fill all of the present and future needs of preference customers in the area. Further, the evidence here fails to show that preference customers will be able to take and absorb all of even Buggs Island's salable output for years to come.

In its brief, Interior again has requested that a finding be made to the effect that if the Roanoke Rapids project is built by the Applicant with a pool elevation of 132 feet instead of 127 feet, such construction will adversely affect the Gaston project. Gaston is another of the straight hydroelectric sites in the comprehensive basin plan, which (like the Roanoke Rapids site) has not been authorized, appropriated for or reserved by the Congress for Federal construction. Interior offered no evidence in the 1950 further hearing which would support such a finding or cast doubt upon the testimony by Witness Strandberg, for the Applicant, who testified to the effect that relocation of the Gaston site would not affect the benefit-to-cost ratio for the Gaston site. The Applicant's exhibits show that the power values to be gained by operating the Roanoke Rapids project at Elevation 132, rather than at Elevation 127, will more than offset any loss of value from lowering the net head available at Gaston, considering the matter on the basis of the total maximum power values to be obtained from the water resources at the two sites. Paragraph "(C) (x)" of the order in the March 1950 decision calls for further study to be made by the Applicant and for approval of the Commission to be obtained, before the height of the Roanoke Rapids pool may be established finally at Elevation 132 mean sea level. The evidence does not indicate any [5650] necessity for further consideration at this time of the effect of the Applicant's proposed project upon the undeveloped and unreserved Gaston site which, the record shows, may, in fact, be moved a short distance upstream to a probably better site which will cost less to develop.

Interior also contends that the economic feasibility of the proposed Roanoke Rapids project should be based on the cost of a steam plant of 72,000 kw. rated capacity, which might be overloaded to carry 91,000 kw. for short periods of time. However, the evidence shows that Applicant's Exhibit 15, on economic feasibility, including a comparison of steam costs and Roanoke Rapids hydroelectric costs, was based upon the *capability* of the generating units for both the proposed hydroelectric project and the equivalent steam program, not on rated or name-plate capacity.

The completed application for license to construct the power plant and dam at Roanoke Rapids was filed April 6, 1949. The contest here has been greatly protracted. In the present grave emergency, the Government looks to private industry for cooperation and support and, where practicable, for increased investment of private capital for the immediate strengthening of the national economy and security. In this case, an experienced and successful private utility company is ready, willing and able to proceed under Federal license and regulation with the development and utilization of idle and wasting natural resources at Roanoke Rapids without aid of the Federal Treasury and substantially in harmony with the Army's comprehensive plan. Its proposed project [5651] has been approved by the Army Engineers.

An additional supply of much needed electric power produced by a private utility under governmental license and regulation (designed by the Congress to protect and promote the public interest) would have much the same relationship and value to national security that an additional supply of government-produced power would have.[13] In view [5652] of the willing-

[13] In this connection, the speech of the able Secretary of the Interior in welcoming on October 19, 1950, the 30 members of his Electric Utilities Defense Advisory Council (two-thirds of whose membership consist of officers and private electric utility companies) and making a strong and patriotic request for cooperation between all segments of the industry in expanding and enlarging generating capacity and in preventing power supply bottlenecks from impeding industrial expansion, seems particularly pertinent and timely. The Secretary according to a press release issued by the Interior Department, among other things, said:

"I am happy to welcome you to the first meeting of the Electric Utilities Defense Advisory Council. Those of us in this room today have a tough

ness and desire of the Applicant to utilize immediately the now largely idle and wasting waters of the Roanoke at Roanoke Rapids to produce needed additional power and the existing necessity for the exercise of special care in the long-term investment of public funds, as well as upon consideration of the other facts of record, the prospect of the government, itself, through new legislative authorization and appropriation, undertaking construction of a purely hydroelectric project at the Roanoke Rapids site, appears to be even more remote and improbable now than when the decision of March 1950 was issued. Further delay in the construction of the Roanoke Rapids project would prolong unnecessarily the wastage of the water of the Roanoke River. Such continued wastage could not, it is thought, be justified now in the face of the pending application, the established need for additional power in the area and the general need for increased effort and speed in

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job ahead of us. Or job is to make sure that enough electric power is available when and where it is needed to meet the expanding requirements of the National Defense Program and at the same time to take care of the requirements of all segments of the civilian economy. Expansion is the keynote of the Rearmament Program we are now undertaking. The Defense Production Act passed by Congress last month contains an entire section dealing with expansion of productive capacity and supply." And President Truman has made it clear that long-range defense plans will call for enlarging our capacity to produce all along the line. In the field of electric power, therefore, our job is to build up the country's power plant as rapidly as we can, and to increase efficiency by every means that ingenuity can devise, in order that enough power will be available to keep our entire economy, civilian and military, running in high gear, despite sharply increasing demands for electric energy. Since the Korean conflict began the private electric utility companies have announced plans for very large additions to generating capacity. Those companies are to be commended for their prompt recognition of the seriousness of the situation. In my opinion, however, presently planned expansion will be insufficient to meet prospective demands, as we now see them, and I hope that the members of this Council will today consider ways and means by which further expansion in capacity can be accomplished. To do the tremendous job ahead, to prevent power-supply bottlenecks from impeding industrial expansion, calls for unremitting effort, resourcefulness, and ingenuity on the part of every member of the Electric Utility Industry. In addition, it calls for unselfish and willing cooperation between all segments of the industry. That is why I have asked you to meet here today. * * * I ask you to join forces with us here. I ask you to give us your cooperation, your advice and your assistance in doing the difficult job ahead. I am sure that all the public and private power that can be developed will be needed in the current situation."

the development and employment of idle water resources in the interests of the country's economy and safety.

[5653] FINDINGS AND CONCLUSIONS

Upon consideration of the evidence, including of course the additional evidence received in the 1950 further hearing, and considering also the briefs and argument of counsel with their suggested findings and conclusions, the following findings and conclusions additional or supplemental to those already stated herein and in the March 1950 decision, have been reached and are here made:

(1) There is an authorized navigation project for the Roanoke River, which was adopted by the Congress in 1871. This project was modified in 1930 and 1938 in certain respects in accordance with recommendations of the Army Chief of Engineers, but the portion of the authorized navigation project lying between Palmyra Landing and Weldon, North Carolina, has not been modified by Congress since its adoption in 1871. The 1871 authorized navigation project calls for a channel 5 feet deep, 50 feet wide and 50 miles long between Palmyra Landing and Weldon, North Carolina.

(2) No improvement work, other than routine maintenance of the existing channel, has been performed on the upper portion of the navigation project between Palmyra Landing and Weldon, North Carolina, since 1905. (H. Doc. No. 694, 75th Congress, 3d Session, p. 10). In 1943, the Chief of Engineers reported that the existing project had been completed to the practicable limit and that it was impracticable to develop and maintain the project above Palmyra by dredging, snagging and regulation. (Annual Report, Chief of Engineers, [5654] 1943, Part 1, Vol. 1, page 426). This statement is repeated in the latest (1949) Annual Report of the Chief of Engineers (Part 1, Vol. 1, p. 620).

(3) Low water depth at Weldon, North Carolina, was reported to be about one foot in 1937. In the latest separate report on this river by the Chief of Engineers, requested by Congress, the low water depth from Palmyra to Scotland Neck was stated as being two feet, and thence to Weldon, about one foot. In the said latest (1949) Report of the Chief of Engi-

neers (Part 2, p. 549) the controlling depth in the Palmyra-Weldon section is stated to be one foot.

(4) Upon the filing of the application for license by the Applicant for Project No. 2009, the Commission, under Section 4 (e) of the Federal Power Act, requested the Department of the Army to study the Applicant's plans affecting navigation and to recommend for insertion in the license such terms and conditions as that Department might deem necessary in the interest of navigation.

(5) The Department of the Army advised the Commission that the present plans of the proposed structures appear to be satisfactory in respect of the interests of navigation and recommended certain usual terms and conditions for inclusion in any license issued for the project. Among these virtually standard conditions were reservations of the right of the United States to construct, complete or improve navigation facilities in connection with the said project; provision for free power for operation of the aforesaid facilities; reservation of [5655] the right of control of the operation of navigation facilities including control of the level of the pool caused by the dam; reservation of the right to use water for the purposes of navigation and reservation to control the use, storage and discharge of water in the interest of navigation.

(6) The Department of the Army did not recommend or suggest any provision for continuous minimum releases in the interest of navigation, nor were regulations specifying rates of increase in discharge from the power plant recommended or requested to be included in a license. It was indicated that rates of change of discharge might be imposed at some later date if it should be found necessary in the interest of navigation.

(7) The Army's Definite Project Report (Exhibit 10) for the Buggs Island project, now under construction, and a letter dated May 4, 1949, from the Chief of Engineers (Exhibit 9), state that the Buggs Island Reservoir will be operated primarily for the control of floods and for the development of hydroelectric power, but that incidental operation of the project for pollution abatement and low-water regulation is also planned. These Exhibits contain an evaluation of flood con-

trol, land enhancement, power, and incidental benefits, but no evaluation of navigation benefits.

(8) The Army Engineer's reports, Exhibits 8 and 10, specify no minimum release of water for navigation from either the Buggs Island or Roanoke Rapids project but do provide for minimum continuous releases in the interest of pollution abatement and the conservation of [5656] fish life, varying from 500 c. f. s. in the fall and winter to 2,000 c. f. s. in the spring and summer.

(9) Maintenance of a five-foot open navigation channel from Palmyra Landing to Weldon might require approximately 2,500 c. f. s. continuous flow in addition to snagging and dredging operations. Such release is not provided for in the Army's present operation plan for the Buggs Island Reservoir, nor has the Department of the Army recommended or made any provision in its report under Section 4 (e) of the Act that such continuous flow, or any other continuous flow for the same purpose, be provided by the Applicant's proposed project at Roanoke Rapids.

(10) Without upstream regulation during periods of low flow, it would be physically impossible for any project down at Roanoke Rapids to release a continuous flow of 2,500 c. f. s. with the small storage contemplated or practicable at that site, there being extensive periods which recur annually when the natural flow of the river is considerably less than 2,500 c. f. s. The same limitations would exist if a Roanoke Rapids project were to be authorized and built by the Government according to the comprehensive plan contained in House Document 650.[14]

(11) The Buggs Island project could provide a minimum continuous flow of 2,500 c. f. s. by the release of water from storage during low-flow periods, if required in the interest of navigation. Whether or not [5657] such continuous releases would reduce the capacity of the Buggs Island project would depend upon the type of load this project may be required to serve.

[14] Exhibit No. 1.

(12) Since the Roanoke Rapids project either as proposed by the Applicant or as proposed by the Army Engineers would be virtually a run-of-river development, any continuous release required of it for navigation would necessarily first emanate from an upstream storage reservoir sufficient in size to provide water for such continuous release. This would be the case whether a project at Roanoke Rapids were built by the Applicant or by the United States, since the site at Roanoke Rapids does not lend itself to development of a large reservoir.

(13) With Buggs Island project in operation as contemplated in the Definite Project report, the Roanoke Rapids project could act as a reregulator releasing at least a minimum continuous flow of 2,500 c. f. s. as may be required for any possible future navigation without adversely affecting its economic feasibility, while enabling the Buggs Island project to act without restriction as a peak load plant.

(14) There is no evidence here which establishes the probability of a future requirement for any continuous minimum release of water for navigation from storage reservoirs on the Roanoke River.

(15) The evidence does not show that the 1871 adopted navigation project between Weldon and Palmyra Landing will be reactivated within the foreseeable future. In fact, the evidence is to the contrary. [5658] Accordingly, the Applicant's economic analysis of the proposed Roanoke Rapids project, which is based on a 58-year depreciation period, need not take into account a 2,500 c. f. s. continuous release for navigation.

(16) House Document No. 650 proposes that if and when navigation improvements immediately below Weldon are contemplated, the proper modern-day development would be for 8-foot navigation and that this could be provided by the installation of a lock and slack-water navigation dam at mile 114, about 24 miles below Weldon. This proposal would appear to have a logical basis in view of the fact that the present navigation channel to Palmyra, the present head of navigation, has been improved to provide for 8-foot navigation.

(17) If the Palmyra Landing-Weldon section of the Roanoke River should be improved for navigation in the manner suggested in House Document 650, it would be unnecessary for

any continuous minimum flow requirements to be imposed by the Department of the Army, either on its own Buggs Island project or any project at Roanoke Rapids, since the pool of the Army-suggested dam at mile 114 could act as a reregulator providing the continuous flow required for the reach of the river between mile 114 and Palmyra. The pool itself would provide navigable depths from mile 114 to Weldon.

(18) The proposed Roanoke Rapids project will be fully dependable to 91,000 kw. capacity on the Applicant's system load under regulated flow conditions during the critical period, as contemplated in the Definite Project Report, even if required to release a continuous flow of 2,500 c. f.s. for navigation.

[5659]. (19) The Buggs Island Project will provide 4,310 c. f. s. as the minimum uniform regulated flow at Roanoke Rapids for the critical 332-day period.[15] But, the regulated outflow of the Buggs Island Project when operated as proposed in the Definite Project Report would be 7,000 c. f. s. during December of the critical period and December is the month of peak demand on the Applicant's system. The evidence shows that the Roanoke Rapids project would be fully dependable on the Applicant's load with either 4,310 or 7,000 c. f. s. and could release a continuous flow for navigation of 2,500 c. f. s. if required.

(20) It is concluded that the Applicant's proposed project is best adapted to a comprehensive plan for the improvement of the Roanoke River for navigation, within the meaning of Section 10 (a) of the Federal Power Act.

(21) There is no evidence of substance expressly showing the extent of recreational use of the stream below the Roanoke Rapids site or the effect of the operation of the proposed Roanoke Rapids project on recreation. However, it is common knowledge that a reservoir with limited drawdown such as that contemplated by the Applicant will within itself provide substantial recreation benefits for the area.

(22) The Roanoke Rapids project, either as contemplated by the Applicant or exactly as proposed in House Document No. 650, would have no effect (either beneficial or adverse)

[15] Exhibit No. 87 and testimony of Administrator Creim (T. 2483).

upon the flood control plans for the basin. The contemplated storage at Roanoke Rapids is of insufficient magnitude to impound the water necessary for flood control purposes. Regulation of water for flood control is provided [5660] by the Government's Buggs Island project which was designed for that primary purpose, and the spillway gates at Roanoke Rapids, as contemplated by the Applicant, must be operated in such a manner as not to nullify or impair flood control benefits to be obtained from the Buggs Island project. There is no evidence that the operation of the Roanoke Rapids project, as proposed by the Applicant, would constitute an unusual hazard to life or property.

(23) The same releases of water for pollution abatement and preservation of fish life are provided for in the operation of the proposed Roanoke Rapids project as for the Government's Buggs Island project. The requirements for off-peak continuous releases by the Buggs Island project, for pollution abatement and control and maintenance of fish life, all relate to the section of the Roanoke River at or below Roanoke Rapids. For this reason the Applicant's proposed project could relieve the Buggs Island project of the burden of providing these continuous releases during off-peak periods, and is "best adapted" for these beneficial public uses.

(24) In order to be "best adapted to a comprehensive plan" for the "improvement and utilization of water power development," as that language is used in Section 10 of the Act, a proposed hydroelectric plant of course must be economically feasible. To be economically feasible, such project must be capable of fulfilling the anticipated load requirements at an annual cost equal to, or less than, that which would be paid for the equivalent power obtainable from an alternative source.

[5661] (25) The load requirements of the Applicant, as projected through 1952, show that in order to continue to perform its duty competently the Applicant must have at least 91,000 kw. of additional capacity from some source. The evidence introduced which establishes this need has not been challenged or controverted.

(26) The load of the Applicant now supplied largely by steam-electric plants will have such magnitude and shape by

1953 that the capacity of the project which the Applicant proposes to construct at the Roanoke Rapids site will be fully dependable upon such load, and the energy output will be fully absorbed.

(27) The dependable capacity of the proposed Roanoke Rapids project will be 91,000 kw. on the Applicant's anticipated system load under natural flow conditions comparable to the lowest December weekly flows of record considering the required minimum continuous releases for pollution abatement and conservation of fish life.

(28) The dependable capacity of the proposed Roanoke Rapids project will be 91,000 kw. on the Applicant's anticipated system load under low-water regulated flows from the Government's Buggs Island project. It has been established that under such regulated flow conditions a continuous release of approximately 2,500 c. f. s. may be made without affecting the dependable capacity of the proposed project, if such release should ever be required for navigation.

(29) The average annual energy output from the proposed Roanoke Rapids project, if required to operate on natural stream flow, is [5662] estimated to be 275,000,000 kwh. The average annual energy output based upon anticipated, regulated stream flow is estimated to be 345,000,000 kwh.

(30) Storage regulation by the Government's Buggs Island project will permit the Roanoke Rapids project to generate about 70,000,000 kwh. more energy than it would generate on natural stream flow.

(31) If the Applicant were to construct a steam plant in order to secure an additional 91,000 kw. of dependable capacity, and 275,000,000 kwh. of average annual energy for its system (which would be obtainable from the Roanoke Rapids plant utilizing the natural flow of the river), the annual cost of such a plant would be approximately $150,000 more than the annual cost of the Roanoke Rapids project.

(32) The 70,000,000 kwh. of additional average annual energy which will result from storage regulation by Buggs Island would cost the Applicant about $250,000 if obtained from a steam plant.

(33) The headwater benefit payment, required to reimburse the Government for headwater benefits actually conferred, therefore, cannot equitably exceed, on the average, $250,000 annually.

(34) Low-water regulation by the Buggs Island project will confer no capacity benefits upon the Roanoke Rapids project since the Roanoke Rapids project would be fully dependable (91,000 kw.) by utilizing only natural river flow.

(35) Headwater improvements may enhance the economic feasibility of a downstream project. In the process of conferring "benefits," an [5663] upstream improvement cannot impair the feasibility of a downstream project which would be economically feasible without such benefits. Thus, if it be established that a downstream project would be a successful enterprise if required to operate on natural flows or their equivalent, such project is destined to remain a successful enterprise if the flows of the river are improved by upstream storage regulation. The evidence shows that the proposed Roanoke Rapids project would be economically feasible on the natural flow.

(36) The Southeastern Power Administrator, marketing agent of the Department of the Interior under the Flood Control Act of 1944 for government-produced energy in the Southeastern United States, stated as a witness in this proceeding that the operation of Buggs Island will not be such as to deprive the Applicant of water which would be equivalent to the natural flow of the stream. With such express assurance voluntarily given by the Administrator in the record, it will not be necessary for the Applicant to enter into a contract with the Government to protect itself against upstream operation which might render its project less favorable by impairing its dependable capacity. The assurance of the Southeastern Power Administrator that he will not operate Buggs Island so as to deprive the Applicant's project of the equivalent of the natural flow of the stream, which, if done, might well make it less feasible, furnishes a correct assurance of the cooperation referred to in the decision of March 1950 as desirable and proper between the Government and private investors.

[5664] (37 The evidence shows that 10,120 day second-feet of water [16] (or c. f. s. days) would be needed at Roanoke Rapids to supply the requirements of the project for peaking purposes (91,000 kw.) and continuous minimum releases (500 c. f. s.) during the peak load week of December. It has been shown also that the project could be operated so as to supply the necessary 91,000 kw. of capacity during the periods when such capacity would be required by the system, with flows equal to those recorded for the month of December 1917 (the lowest December flow of record, a condition largely attributed to unusual ice conditions) or for December 1931 (the December of the lowest water year on record).

(38) The Exhibits introduced by Interior [17] relating to dependable capacity and headwater benefits are all based upon a common erroneous assumption. This assumption is that the proposed project must always occupy the same position on the system load as was assigned to it by the Applicant's engineers for the fullest utilization of regulated flows of approximately 7,680 c. f. s. at Roanoke Rapids during the month of highest system peak demand (December) and illustrated by Exhibit 74. For such assignment on the load, the Buggs Island outflow [5665] amount of 7,000 c. f. s. was obtained from the Army's Definite Project Report for the Buggs Island project. The additional 680 c. f. c. is the estimated natural inflow between the two sites. The position on the load curve illustrated by Exhibit 74, which will give maximum capacity and energy on a flow of approximately 7,680 c. f. s. is not the position which will yield maximum capacity and energy from lower flows. Thus when this Exhibit 74 position on the load curve which was intended for the use of 7,680 c. f. s. is ap-

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[16] A day second foot is the volume resulting from a uniform flow of 1 c. f. s. flowing for a period of 1 day (86,400 cubic feet).

[17] These Exhibits are numbered 79, 80, 81 and 87. Six other Exhibits marked for identification as 79A, 80A, 80B, 81A, 81B, and 87A, but not received in evidence, have nevertheless been given attention but did not affect this finding and would not make it necessary or appropriate to change the finding even if they had been admitted in evidence. They were based upon the same erroneous assumption as were Exhibits 79, 80, 81 and 87 which were offered and admitted in evidence during the further opportunity—not limited as to the time to be consumed—given to the Interior in which to present its additional evidence at the further hearing held in June 1950. The rejected Exhibits were presented and discussed by the Commission's permission, in Interior's latest brief.

plied to lower flows, capacity deficiencies seem to result.[18] However, the anticipated load requirement of the VEPCO system—a system which is supplied almost entirely by steam capacity [19]—is such that the entire system load curve is available and may be [5666] used by the new hydroelectric plant, in the selection of the best position for utilization of the available water. Applicant's Exhibit 92, reproduced here, shows the estimated December 1953 weekly system load curve (from Exhibit 29) which contains the annual system peak demand for the Virginia Electric and Power Company. The position in the system load curve which utilizes the flow to be released by the Buggs Island project (7,000 c. f. s.) plus the tributary inflow between the Buggs Island and Roanoke Rapids sites (680 c. f. s.) is illustrated by the cross-hatched areas [20] including the continuous generation in the base resulting from an assumed 1,000 c. f. s. continuous release which is twice the continuous minimum release which is required for the month of December. Such position would make the total capacity carried by the proposed Roanoke Rapids plant (and the existing plant which will supply 5,000 kw) equal to 96,000 kw. This Exhibit 92 further shows that there is ample space higher in the system load curve where the proposed Roanoke Rapids

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[18] Cross-examination of Administrator Creim on this subject brought out the fact that the studies by Interior took no account whatever of the system load requirement of the applicant. When asked whether such a study could have been made, Mr. Creim said:

"Now I could sit here and make up a thousand different studies under all different kinds of assumptions and you could come up with as many load patterns as the human mind could develop. *And it goes without saying that the dispatchers will operate not only this plant, but any plant, on one part of the load curve today and on another part of the load curve tomorrow, on a consolidated system.*" [Emphasis added.]

When asked whether he had made a study to determine what, in fact, would be the energy requirements to make the 96,000 kilowatts of capacity dependable on the company's system load, Mr. Creim stated:

"No, I haven't drawn any conclusions or made any study as to that."

Further, when asked whether Exhibit 74, is a necessary measure of the load that has to be carried to be dependable on the 1953 VEPCO load for the week of annual peak load in December, Mr. Creim said:

"It is one measure. *There could be others.*" [Emphasis added.]

[19] Exhibit No. 16.

[20] This portion of the system load curve was separately introduced in the 1949 hearing as Exhibit 74.

plant could operate to its full capacity with much less water than is required by the operation illustrated by the cross-hatched areas. A position which requires less water is illustrated on this Exhibit 92 by the solid black portion in the peaks of the system load curve.[21] The evidence shows that the proposed Roanoke Rapids Plant, [5667] operating under the most adverse natural December stream flow of record, could carry a portion of the system load curve similar to that illustrated on Exhibit 92 by the solid black areas, with assumed required minimum releases of 500 c. f. s., making the total capacity carried by the proposed and existing plants equal to 90,000 kw. It is concluded that the proposed Roanoke Rapids project will be fully dependable to 91,000 kw on the Applicant's anticipated system load under either natural or anticipated, regulated flow conditions (the latter derived from the Army's Definite Project Report), and that the Applicant's proposed project will not, therefore, receive from the Buggs Island project any increase in dependable capacity.

A reproduction of Exhibit 92 next follows.

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[21] A diagram representing this portion of the system load curve was separately introduced in the 1949 hearing as Exhibit 61.

[5668]

VIRGINIA ELECTRIC AND POWER COMPANY

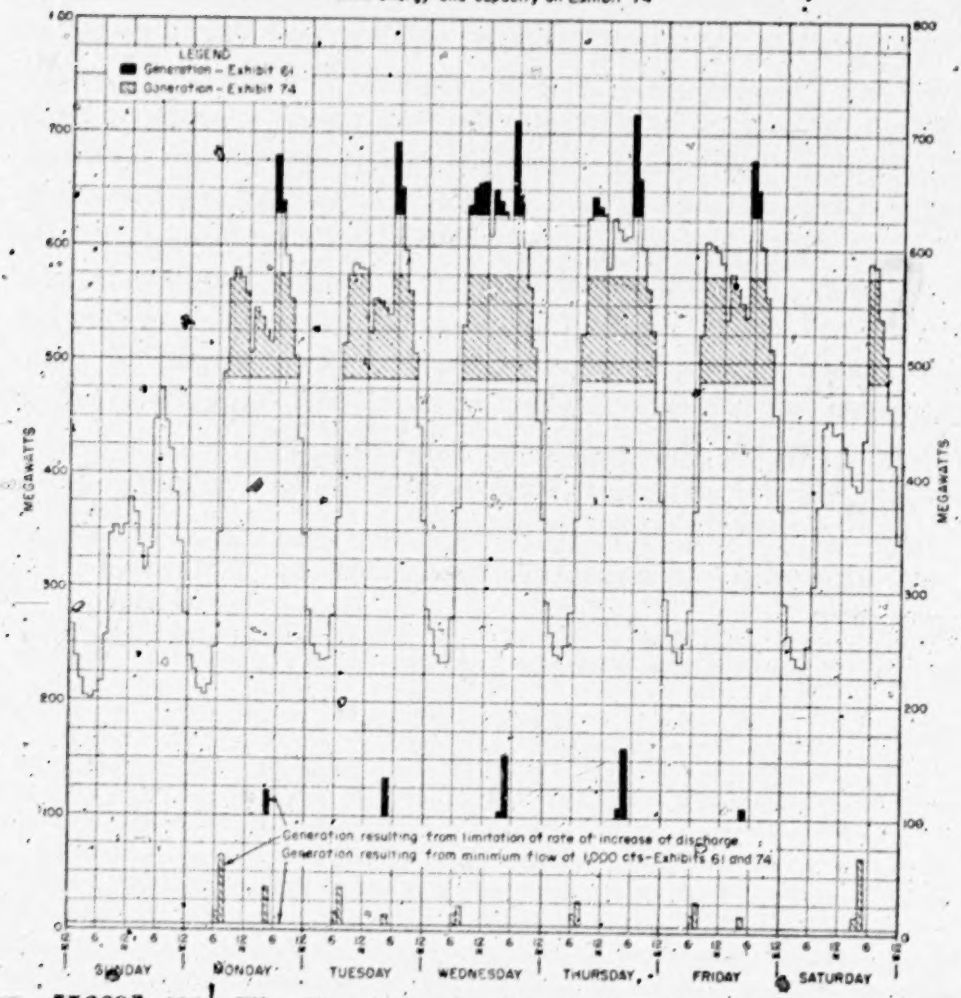
ESTIMATED WEEKLY LOAD CURVE

WEEK OF ANNUAL PEAK - DECEMBER 1953

Syst Op Dept March 1, 1949

Relative location of energy and capacity on Exhibit 61 with energy and capacity on Exhibit 74

FEDERAL POWER COMMISSION
Docket No. Pg. 2009
Hearing Ex. No. 22
Date Identified June 15, 1950
Date Admitted June 15, 1950



[5669] (39) The Food Control Act of 1944 confers authority upon the Secretary of the Interior to sell and deliver the surplus "power and energy" generated by constructed government projects, at the lowest rates which will meet the costs of production and transmission, and provide for amortization of that part of the Government's investment allocated to power, and, in so disposing of such "power and energy," to give preference to public bodies and cooperatives while encouraging the most widespread use of electric "power and energy" at the lowest possible rates.

(40) The Flood Control Act of 1944 does not charge the Secretary of the Interior with the duty or confer authority to provide means to supply *all* power requirements of public bodies and cooperatives, except insofar as it can be done from the surplus power available from constructed army projects when such preference customers wish to purchase it and are able and willing to take it upon terms which meet the standards prescribed in Section 5 of the said Act; nor is authority found in Section 5 to arrange for or provide new sources of power for new preference customer loads to be developed in the future.

(41) The evidence of record looking toward proof that the energy requirements of public bodies and cooperatives within transmission distances of power generating stations on the Roanoke River will exceed the ultimate generating capacity and energy output of the Buggs Island project at some time in future years is immaterial to any issue in this case.

[5670] (42) The evidence here is not sufficient to establish that all of the surplus power from the Buggs Island project can be sold to the preferred public bodies and cooperatives at rates consistent with sound business principles (and in accordance with the standards of Section 5) as soon as that power will be available. The full data necessary for determination of that question are not in evidence and not yet available. Likewise, the estimates and forecasts of the future extent of the preferred market for government-produced surplus energy from projects not yet authorized are uncertain and subject to question and cannot be accepted without adequate proof or sufficient factual support merely because uttered by an experienced engineer who was frank enough to characterize his study of area power requirements as a "quickie," still incomplete.

(43) The entire surplus power output of the Buggs Island project will be marketable under the terms of Section 5, Flood Control Act of 1944, when available; and the said Act requires it to be sold. The Secretary has authority to sell all of it at or near the bus bar to preference customers or to others including private companies, so long as adequate provision is made to supply preference customers (public bodies and co-

[5668]

VIRGINIA ELECTRIC AND POWER COMPANY

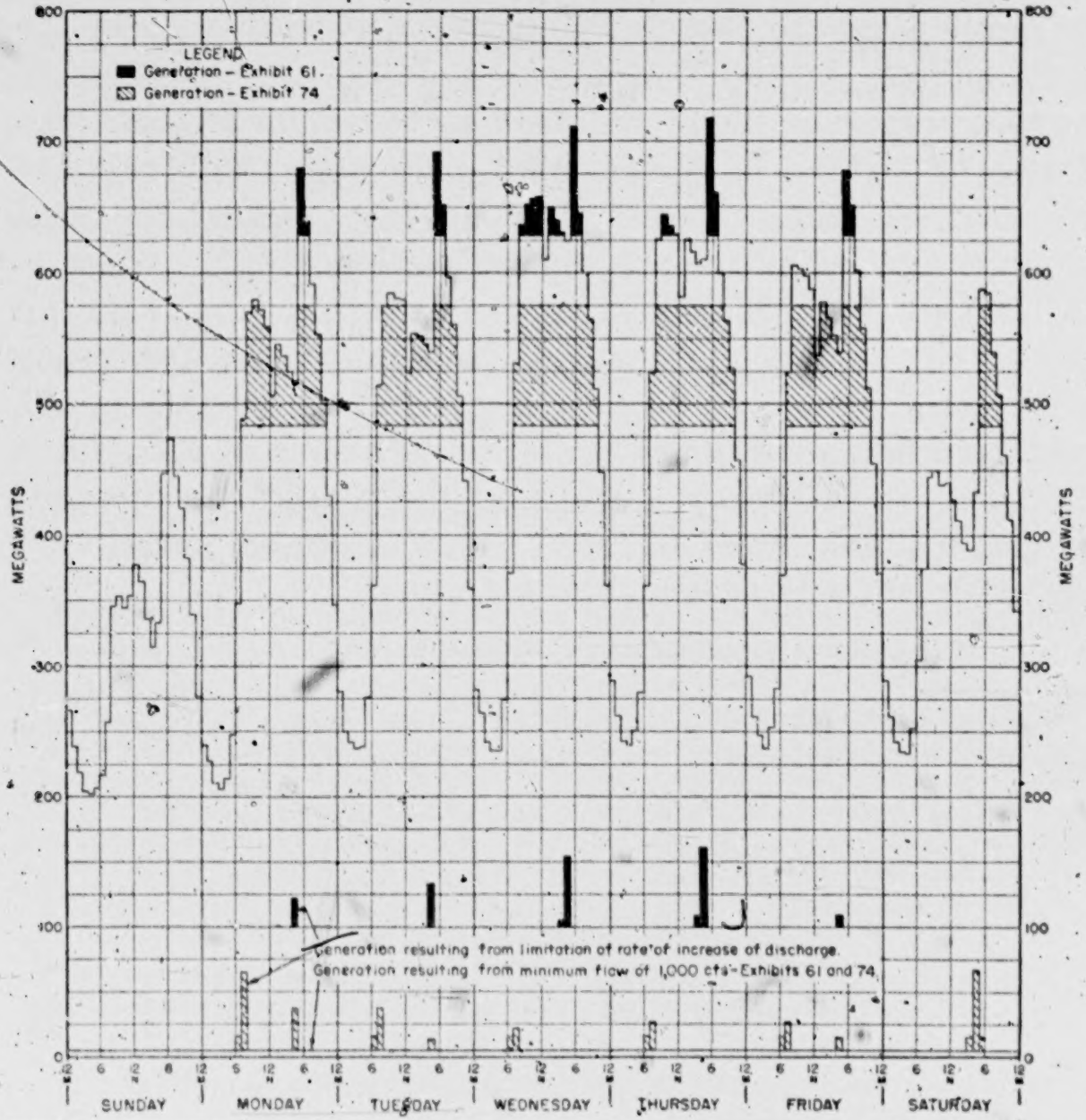
ESTIMATED WEEKLY LOAD CURVE

WEEK OF ANNUAL PEAK - DECEMBER 1953

Syst. Op. Dept. March 1, 1949

Relative location of energy and capacity on Exhibit 61 with energy and capacity on Exhibit 74

FEDERAL POWER COMMISSION
Docket No. Proj. 2009
Hearing Ex. No. 92
Date Identified June 16, 1950
Date Admitted June 16, 1950



operatives) with such power as they desire whenever they are ready to purchase and receive it under the terms of the statute.

(44) The evidence does not establish the need for government transmission facilities in order to dispose advantageously of the Buggs Island surplus power at wholesale as required by Section 5 of the 1944 [5671] Act as soon as this power becomes available.

(45) The annual load factors of public bodies and municipalities, which might be in position to purchase energy from Buggs Island, have a range of from 44 percent to 48 percent. Because of the low annual flows which must be expected, there will be years when the Buggs Island project must operate on an annual load factor of around 21 per cent to 23 per cent if it is to be operated so as to obtain the greatest capacity benefits. For this reason, systems with higher than 23 per cent load factor must have other sources of supply such as steam plants in order to use the Buggs Island plant at its greatest capacity value.

(46) The authorization to construct and acquire necessary transmission lines and "related facilities" in the Flood Control Act of 1944 cannot properly be interpreted as including authorization to construct or acquire additional hydroelectric generating stations, even if access to such a source of additional electric energy would serve in some measure to reduce the sale price of Buggs Island power.

(47) The so-called "Memorandum of Understanding" between SEPA and the Old Dominion Electric Cooperative whereby it is contemplated that SEPA will furnish power to the Old Dominion, is not, the record makes clear, a binding contract for the sale of power from the Buggs Island project.[22] The evidence does not show that the Cooperative has secured the necessary authorization from the State of Virginia to embark upon its steam program, an indispensable element in its being able to [5672] utilize any considerable block of low-load factor energy from Buggs Island. Further, the defense program of the Government with respect to possible control of the use of strategic materials, and the avoidance of unnecessary duplication of transmission facilities, may delay substantially

[22] Testimony of Administrator Crom.

the completion of the Cooperative's program, even if State authorization be obtained. It has not been shown that licensing of the development of the Roanoke Rapids project to the Applicant, a private utility company, would have any adverse effect upon the marketing of surplus energy from the Buggs Island project within the terms and meaning of Section 5 of the Flood Control Act of 1944.

(48) The evidence (including, of course, the additional evidence received at the 1950 hearing) furnishes no proper or sufficient basis or justification for a finding under Section 7 (b) of the Federal Power Act that the development of the water resources at Roanoke Rapids should be undertaken for public purposes by the United States, itself.

(49) The additional evidence received does not show that the Roanoke Rapids site would be developed at any time by the Federal Government, should the pending application for license be denied. Such denial would of course permit the water, which the Applicant plans at once to utilize, to continue to be wasted to the sea.

(50) The project proposed in the pending application of Virginia Electric and Power Company meets the requirements of Section 10 (a) and the other pertinent provisions of the Federal Power Act, and no change or modification is necessary or appropriate in the findings and [5673] conclusions upon this issue appearing in the March 1950 decision.

(51) Upon the evidence, it appears that the Applicant's proposed project will be economically feasible.

ULTIMATE CONCLUSION

Upon the record as augmented by the additional evidence received in the 1950 further hearing, it is concluded that a license should be issued to Virginia Electric and Power Company, upon its pending application, in accordance with the terms and conditions of the order contained in the March 1950 initial decision which order, it is here decided, needs no modification and shall be and remain the order of the initial decision as such decision is here supplemented.

This 15th day of November 1950.

FRANK A. HAMPTON,
Chief Presiding Examiner.